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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

AQUATIC TECHNICAL SERVICES, INC.,
Petitioner,

v.

COUNTY OF NASSAU, NASSAU
COUNTY POLICE DEPARTMENT,
SAMUEL ROZZI, Commissioner
of Police, and FRANCIS T.
PURCELL, County Executive,
Respondents.

WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Are towing operations conducted by marine police officers in non-emergency situations performed in excess of valid police powers?

II. Do these towing operations infringe upon a private salvor's constitutionally protected liberty and property interests?

III. Does marine police officer's unwarranted questioning of a private salvor in front of potential customers infringe the salvor's constitutionally protected liberty and property interests in his good name and reputation when these actions result in loss of business to the salvor?

LIST OF PARTIES

In addition to those parties listed in the caption of this case, ROBERT S. RICKARD, sole stockholder and president of Aquatic Technical Services, Inc., was made a plaintiff by the trial court and is a petitioner in the present action.

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OPINIONS BELOW

The judgment of the Supreme Court of New York, Trial Term, dated September 15, 1981, is unreported and is set out in the Appendix at pp. A-3 to A-5. The opinion of that same court, dated August 10, 1981, is also unreported and is set out in the Appendix at pp. A-6 to A-24. The order of the Appellate Division of the Supreme Court of New York, dated August 2, 1982, is also unreported and is set out in the Appendix at pp. A-25 to A-26. The order of the Court of Appeals of New York, dated November 16, 1982, is also unreported and is set out in the Appendix at pp. A-27 to A-28.

JURISDICTION

The order of the Court of Appeals of New York dismissing the appeal from the Appellate Division was entered on November 16, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The due process clause of the fourteenth amendment to the United States Constitution provides:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

The legal bases of this appeal are two: (1) that officers of the Nassau County (New York) Marine Bureau (hereinafter, "the marine police") denied Aquatic Technical Services, Inc. (hereinafter, "Aquatic")

and its president, Robert S. Rickard (Aquatic and Rickard often will be jointly referred to hereinafter as "Rickard"), liberty and property interests in the right to make a living, as guaranteed by the due process clause of the fourteenth amendment of the United States Constitution, and (2) that the marine police took steps to actively rob Rickard of his liberty interest in his good name and business reputation, as guaranteed by the due process clause of the fourteenth amendment to the United States Constitution. These issues were first raised in paragraph 30 of Rickard's verified complaint, dated July 14, 1978, where Rickard charged:

> The actions and policies of the defendant Nassau County Police Marine Bureau are without authority because they constitute the taking of private property without just compensation, contrary

to Article I, Section 6, of the Constitution of the State of New York, and the Fourteenth Amendment to the Constitution of the United States.

The trial court held, essentially, that Rickard "did not demonstrate a right or privilege in the property" of his towing service. (A-18) The Appellate Division affirmed for this reason (A-25), and the Court of Appeals found that "no substantial constitutional question is directly involved." (A-28)

The facts of this case are not in dispute. Rickard is president and the sole stockholder of Aquatic, which was incorporated in 1962. Aquatic is a company that performs marine towing and salvage and related functions and is located in Nassau County, New York. Rickard started Aquatic as a full-time business while he was employed elsewhere and initially directed the business only

at the salvaging of larger ships. When Aquatic performed only this type of service, no problems existed between Aquatic and the marine police.

The marine police were established in 1938 but had their first large fleet of boats built in 1950. At the time this action was heard, the marine police had a manpower force of 64. They had 16 boats, including four 17-foot whalers, three 20-foot boats, two 31-foot Pacemakers, six 32-foot custom-built boats, at least one of which has a central towing rig as well as standard towing rigs typical of other boats, and a 45-foot steel boat. The marine police broke their duties down into two types: (1) enforcement, by which the police mean enforcement of maritime laws, and (2) patrol, which is a broader category combining enforcement with towing of boats.

With regard to the marine police's towing efforts, one former commanding officer of the marine police told Rickard during the time period involved in this action that the police policy "was to do what they wanted to, with whom they wanted to, where they wanted to, and when they wanted to do it."

Nassau County and the bay on which Rickard lives entertain a large number of pleasure craft, particularly during the summer months. Because of this, after Rickard left his previous job he expanded the towing services of Aquatic beginning in approximately 1976 to include all types of towing, including smaller boats. In approximately 1970, he had received a license from the Coast Guard to operate a towing and salvage service. This license was obtained after taking and passing an examination. Rickard's problems with the marine police

began at the time he expanded his towing service to include smaller craft.

The marine police have conceded that their policy is to tow pleasure craft at any time and for any reason from the point at which aid is requested to a "safe harbor," which the deputy commanding officer of the marine police defines as a point of safety containing a safe mooring, a telephone, gasoline, and shelter. This is one point of contention in the present case. Rickard claims that the marine police are not empowered to tow pleasure craft that are not in emergency situations. In towing pleasure craft not in emergency situations, the marine police are acting without authority in an ultra vires capacity and thus depriving Rickard of his right to pursue the career of his choice. The marine police, however, contend that they have the authority to "operate in situations

in addition to emergencies," according to the stipulation of Joseph Carney, Assistant County Attorney.

Also uncontested is the vast disparity in the number of tows that the marine police and Rickard make respectively during a given year. The marine police concede that they respond to approximately 1,700 calls for assistance during a typical year. These calls are for towing or similar assistance; they do not include calls for more typical police assistance such as investigation, responding to reports of a crime, and the like. Of these calls, the marine police take some action in every one where a boat is still present at the time it arrives on the scene. In the words of the deputy commanding officer, the marine police are "not in the habit of" and will not call commercial salvors. Response to these calls is free in the

sense that individual charges are not made for the services rendered but, instead, the costs are absorbed by the marine police budget and spread throughout the residents of the county.

On the other hand, Rickard typically receives five or six towing jobs per year from initial places where some disabling problem has occurred and twenty to thirty towing jobs per year from safe harbors. (This is in addition to his towing of larger vessels to which the marine police do not respond.) Because he is in a business, Rickard must charge for his service on an individual basis. He contends that the marine police's operation in situations that are not emergencies has served to deprive him of his liberty and property interest in pursuing a career.

In addition to the concessions made by the marine police, however,

Rickard at trial outlined several incidents where the marine police operated outside the guidelines that they have adopted. In one incident, the marine police towed a boat from a safe harbor to which it had been taken by the Coast Guard to an individual's home. Because of this unauthorized towing, the marine police were unable to respond to reports of a disturbance caused by speeders in boats. Rickard has also testified to an incident where the marine police have towed a sailboat past a safe harbor at a Coast Guard station to some further point. The marine police have also been involved in incidents of towing boats from points outside to points inside the county line, which marks their jurisdictional boundary. The marine police also have interfered with Coast Guard assistance on several occasions. One example was in September 1977 when the police

intercepted a response for help sent to the Coast Guard, were told by the Coast Guard not to help, and interfered with an unsuccessful attempt to tow a grounded boat. That this type of interference affects Rickard is shown by an incident in January 1979 where the Coast Guard suggested that a grounded vessel seek commercial assistance but the marine police nevertheless unsuccessfully attempted to tow the boat.

These incidents all occurred outside the scope of what the marine police claim to be their powers. They further serve to deprive Rickard of his liberty and property interests in pursuing a career. As Rickard has noted, whenever the occupants of a distressed vessel had the option of paying for his service or awaiting free marine police service, they inevitably would wait for the marine police service.

One other series of events serves to show the marine police's interference with Rickard's liberty and property interest. Often he would be in the middle of negotiating a price for his services with the occupants of a stranded vessel and the police would arrive on the scene and begin towing operations. Rickard thus was faced with the choice either of relinquishing the tow to the police or insisting that they leave the scene and causing ill will for his business.

Finally, in a series of incidents the marine police have operated in such a manner that Rickard's good name and reputation have been damaged. In June 1981 Rickard and the marine police arrived at the site of a stranded vessel at about the same time. The police insisted that Rickard's boat was not registered and Rickard insisted that it was.

The marine police gave him a citation and took the tow. This citation subsequently was dismissed in court. Virtually the same event, again in front of a potential customer, was played out the next day. As Rickard has noted, this type of questioning occurs only in front of potential customers, never at his dock, which the marine police pass several times daily. This questioning also destroys Rickard's opportunity to do business with the potential customers. This challenge to Rickard's professional credentials results in a deprivation of his liberty interest in his good name and reputation.

The Supreme Court, trial term, ruled against Rickard's due process arguments (A-18 to A-19), the Appellate Division affirmed (A-25 to A-26), and the Court of Appeals of New York dismissed Rickard's

appeal. (A-27 to A-28) The present Petition for Writ of Certiorari was timely filed.

ARGUMENT

I. THE MARINE POLICE'S TOWING OF VESSELS IN NON-EMERGENCY SITUATIONS IS PERFORMED IN EXCESS OF ITS VALID POLICE POWERS.

In the present case, Rickard does not contend that the marine police never may tow stranded or incapacitated private boats. Rickard contends, however, that the marine police only have authority to act in emergency situations. All actions taken by the marine police outside the scope of an emergency are ultra vires, and to the extent that they serve to interfere with Rickard's ability to pursue his career, they infringe upon his liberty and property interests under the due process clause of the fourteenth amendment.

The fourteenth amendment by its own terms applies only to state action. Still, no doubt exists in the present case that the marine police are acting within the scope of state action. The police officials are state officers and employees, their equipment is purchased with state funds, many of the tows to which Rickard objects are made in accordance with written marine police policies, the marine police have admitted that they have a policy of towing any vessel to a safe harbor for any reason, and the tows that are made outside the limits of the written police guidelines are so numerous as to amount to a policy on the part of the marine police. Nevertheless, the actions of which Rickard complains are not taken in accordance with the accepted definition of "police power" and thus constitute invalid, ultra vires activities.

This Court has noted that limits exist to police powers when the State attempts to extend those powers into areas of ordinary commercial enterprise. "[T]he police power is and remains a governmental power, and applied to business activities is the power to regulate those activities, not to engage in carrying them on." Ohio v. Helvering, 292 U.S. 360, 369 (1934) (the Federal Government may tax a state when it engages in the business of selling liquor). The State may engage in ordinary commercial ventures, "but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power." Id. Rickard submits that the marine police can show no authority vested in them aside from their police powers that would authorize their venture into the business

of commercial towing, and that the State's police power alone is not enough to authorize this venture. For that reason, the actions of the marine police are ultra vires.

This Court has also recognized that the exercise of police power is limited to situations where (1) the interests of the public require interference by the State, and (2) the means chosen by the State are reasonable and not oppressive. Goldblatt v. Town of Hempstead, New York, 369 U.S. 590, 594-95 (1962) (upholding ordinance regulating dredging and pit evacuation within town borders). Rickard submits that the marine police's commercial towing ventures fail both prongs of the Goldblatt test. First, the marine police can show no public interest. The marine police's towing operations are aimed at only a small

percentage of the population of Nassau County, those capable of affording a pleasure boat and the costs involved in operating it. Yet, because no charges are made on an individual basis for the tows, the cost must be spread among all residents of the county. Second, the method of operation chosen by the marine police is excessively oppressive. If the police responded only in emergencies, this action would be within the scope of their power. By responding to and acting upon all calls for assistance, whether emergency or not, the marine police have acted in an oppressive manner that robs Rickard of his right to earn a living.

What is and is not an emergency that the marine police should act upon was defined at the trial below by a competitor of Rickard when he defined the meaning of the international maritime

distress signal, "mayday." Mayday properly refers only to "the immediate loss of life and property -- the vessel, the safety of the vessel and the safety of the balance of the passengers on board. It's a serious one." If the marine police were to follow this internationally accepted meaning of the term "emergency," Rickard would have no complaint. Instead, the police operate to tow any vessel for any reason. This action is outside the scope of the State's police power.

Courts in New York have recognized limitations upon the State's police power similar to those recognized by this Court. In Rochester Telephone Corp. v. Village of Fairport, 84 A.D.2d 455, 446 N.Y.S.2d 823, 825 (1982), the court stated that "[t]he general police power must always be exercised within the limits of 'public necessity'." (Village could not require

telephone corporation to relocate transmission facilities underground at its own expense as part of a reconstruction program.) In so stating, the court recognized the rule outlined by one leading commentator:

> [W]hen an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.

Sax, "Takings and the Police Power," 74 Yale L.J. 36, 67 (1964), quoted at 446 N.Y.S.2d at 825. No public necessity for the marine police actions exists because the actions affect too small a segment of the population. In addition, the actions of the marine police tend to drive Rickard and others out of business.

Other courts have recognized similar principles. The court in Sawyer v. Sandstrom, 615 F.2d 311, 315 (5th Cir. 1980) (ordinance prohibiting association with persons known to possess or use dangerous drugs or narcotics is invalid), stated that actions taken under the police power cannot "sweep so broadly as to infringe upon the constitutional and organic rights of an individual." Activities subject to regulation cannot be affected by invading protected freedoms. Id. As will be shown, Rickard has a protected interest in pursuing his occupation, and this

interest is infringed by the unauthorized exercise of power by the marine police.

Similarly, the court in Patch Enterprises v. McCall, 447 F. Supp. 1075 (M.D. Fla. 1978) (upholding county ordinance prohibiting "bottle clubs"), recognized three criteria of valid police power. First, more than a limited number of persons must benefit from its exercise; second, it must not unreasonably restrict guaranteed rights; and third, it must be impartial and non-discriminatory. Id. at 1081. The marine police's activities benefit only a limited number of persons, they restrict Rickard's liberty and property rights, and they are discriminatory for both of these reasons.

The marine police's activities also would fail the test establsished by the court in Ruff v. Marshall, 438 F. Supp. 303 (M.D. Ga. 1977) (invalidating

city curfew and loitering ordinances). This is so because the marine police cannot show either (1) a significant reason to support their actions, or (2) that the actions are tailored to meet specific needs without unnecessarily infringing upon guaranteed individual rights. See id. at 306.

This Court has recognized "the impact which local governments, acting as providers of services, may have on other individuals and business enterprises . . . ." City of Lafayette, Louisiana v. Louisiana Power & Light Co., 435 U.S. 389, 403 (1978). The marine police should not be permitted to continue to provide such an impact upon Rickard's business through the unlawful exercise of its police powers.

II. THE MARINE POLICE'S TOWING INFRINGES UPON RICKARD'S CONSTITUTIONALLY PROTECTED RIGHTS.

A. The Towing Operations Serve to Deny Rickard's Liberty and Property Interests in Pursuing a Career.

The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on Politics, "A man has a right to be employed, to be trusted, to be loved, to be revered." It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the

> opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.

Barsky v. Board of Regents of University of State of New York, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting) (Court upholds doctor's suspension from practice because of conviction resulting in failure to produce documents for House Activities Committee).

Many courts, with this Court among them, have continually recognized that among the rights accorded protection by the liberty and property guarantees of the fifth and fourteenth amendments is the right to pursue the occupation of one's choice. Justice Douglas's words in Barsky are merely the strongest statement of that principle. Although it is true, as recognized in Barsky, id. at 451, that

the Government can place reasonable restrictions on the pursuit of an occupation, it is clear that the Government cannot totally restrict one's practice of an occupation. Yet the actions of the marine police in the present case are having just that effect upon Rickard.

The decisions recognizing a liberty or property interest in pursuing an occupation all have their roots in this Court's decision of Truax v. Raich, 239 U.S. 33 (1915). There, this Court stated that a right exists to earn a livelihood and to continue in employment unmolested by invalid actions of the Government. Id. at 38. The ultra vires actions of the marine police in the present case are precisely the type of invalid Government actions invalidated in Truax.

Such an acknowledgment has been recognized consistently by this Court.

In Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 238-39 (1957), this Court stated: "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Liberty or property interests in holding specific employment and following one's chosen profession free from unreasonable Government interference have been recognized in Greene v. McElroy, 360 U.S. 474, 492 (1959) (revocation of security clearance leading to loss of job with private firm). Accord Hampton v. Mow Sun Wong, 426 U.S. 88, 100-02 (1976) (liberty interest in civil service employment); United States v. Robel, 389 U.S. 258, 265 n.11 (1967).

Liberty and property interests in employment and pursuit of one's occupation have been acknowledged by

numerous courts. See, e.g., Shaw v. Hospital Authority of Cobb County, 507 F.2d 625, 628 (5th Cir. 1975); Maison v. Confederated Tribes of Umatilla Indian Reservation, 314 F.2d 169, 174 (9th Cir.), cert. denied, 375 U.S. 829 (1963); Price v. Block, 535 F. Supp. 1239, 1246 (E.D.N.C.), aff'd without opinion, 685 F.2d 431 (4th Cir. 1982); Gilmour v. New York State Racing & Wagering Board, 405 F. Supp. 458, 459-60 (S.D.N.Y. 1975); Catrone v. Massachusetts State Racing Commission, 404 F. Supp. 765, 770 (D. Mass. 1975), vacated on other grounds, 535 F.2d 669 (1st Cir. 1976); Keker v. Procunier, 398 F. Supp. 756, 760-63 (E.D. Cal. 1975); Hanson v. Unified School District No. 500, Wyandotte County, Kansas, 364 F. Supp. 330, 332 (D. Kan. 1973); Lewis v. City of Grand Rapids, 222 F. Supp. 349 (W.D. Mich. 1963), rev'd

in part on other grounds, 356 F.2d 276 (6th Cir.), cert. denied, 358 U.S. 838 (1966).

In the present case, the marine police have acted outside the authority granted to them under the police powers of the State. In so doing, they have destroyed any opportunity that Rickard would have to make a living in his chosen career as a marine salvor. This is indicated by the number of towing operations of pleasure craft performed by the marine police and Rickard respectively. The marine police respond to approximately 1700 calls per year; Rickard handles five or six calls for initial tows per year of the type of police would handle and another twenty to thirty jobs from safe harbor locations. Yet Rickard has invested time and money in building up his business since it was incorporated in

1962. He has invested in equipment necessary for the operation of his business, only to find his efforts at successful commercial operation of the business thwarted by the marine police.

Such a situation occurred in LaBauve v. Louisiana Wildlife & Fisheries Commission, 444 F. Supp. 1370 (E.D. La. 1978). There, fishermen challenged under the due process clause regulations placed on commercial fishermen by the state, based partially on a $14,000 investment by the fishermen in nets and other equipment. The court stated:

> [W]e conclude that even though the state has proprietary and regulatory interests in wildlife, plaintiff's interests in exercising his fishing license and using his paraphernalia constitute legitimate claims of entitlement within the ambit of "property

rights" under the Due Process Clause of the Fourteenth Amendment.

Our conclusion that the right to pursue an occupation is a legitimate entitlement within the protective purview of the Due Process Clause is further bolstered by Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915), where the court expressly held:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."

Hence, we conclude that plaintiff is entitled to due process of law before

> his interests here at stake can be deprived.

Id. at 1378-79. (The court subsequently concluded that the fishermen had received all of the process that was due them.)

Similarly, the court in Price v. Block, supra, 535 F. Supp. at 1246, concluded that farmers who grew tobacco had a liberty interest in continuing to grow the tobacco. The sole reason the court in Price concluded that the farmers' liberty interests were not taken was that they could continue to grow other types of tobacco. Id. The same cannot be said of Rickard's maritime towing operations.

The court in Keker v. Procunier, supra, 398 F. Supp. at 761, recognized that the right to engage in a given profession was impliedly the right to practice according to the highest standards of that profession. This right has not been accorded Rickard. He has been harassed by

the marine police to the extent that towing jobs he has been in the process of negotiating have been taken from him. Thus, he has been unable to perform in accordance with the highest standards of his profession.

As mentioned previously, Rickard does not contest the valid exercise of police powers by the marine police in emergency situations, as typified by the universal meaning of the international distress signal, "mayday." Instead, Rickard contends that the ultra vires usurpation of non-emergency towing and rescue jobs has served to deny him his protected liberty and property interests in his occupation. This Court should hold that the marine police should not continue to mount such an unconstitutional deprivation of substantive due process rights.

B. The Towing Operations Serve to Deny Rickard's Property Interest in his Towing License.

In approximately 1970 Rickard received a license from the Coast Guard to engage in towing and salvage operations. Thus, for many of the same reasons recognized in the argument above, the actions of the marine police have served to take away the property interest that Rickard has in this license. The effect of the marine police's actions is that the license is, too a large extent, worthless to Rickard.

This Court has recognized that a property interest can exist in such a license. See Barry v. Barchi, 443 U.S. 55, 64 n.11 (1979) (property interest in "clear expectation of continued enjoyment of a license absent proof of culpable conduct"). Other courts similarly have recognized a property interest in a license.

See Lemberos v. Laurel Racecourse, 489 F. Supp. 1376, 1387 (D. Md. 1980) (license that can only be revoked for cause); LaBauve v. Louisiana Wildlife & Fisheries Commission, supra, 444 F. Supp. at 1378-79 (state license as a commercial fisherman). Property interests in similar state-granted benefits also have been recognized. See Maison v. Confederated Tribes of Umatilla Indian Reservation, supra, 314 F.2d at 174 (treaty restrictions serve to give Indians different fishing interests than are given to other citizens).

For precisely the same reasons as were stated in the previous argument, Rickard's property interest in his towing license cannot be taken unilaterally by the marine police. Yet, obviously, that is the effect of the marine police actions. Rickard is no longer able to use his license to engage in the profession he has chosen. The license is virtually

useless to him, and this uselessness is attributable directly to the ultra vires actions of the marine police. This Court should not permit such a situation to continue.

III. THE MARINE POLICE'S ACTIONS IN DAMAGING RICKARD'S GOOD NAME AND BUSINESS REPUTATION HAVE VIOLATED HIS LIBERTY AND PROPERTY INTERESTS IN THAT NAME AND REPUTATION.

This Court has recognized that defamation by government officials, standing alone, does not violate constitutionally guaranteed freedoms. Paul v. Davis, 424 U.S. 693 (1976). In the present case, however, Rickard has testified to more than defamatory statements on behalf of the marine police. He has shown that the marine police questioned the legitimacy of his boat's registration in front of potential customers but never when he was

alone. This leads to the clear implication that the marine police were engaging in their actions solely to discredit Rickard and to drive his potential customers away. Thus, something more than defamation is present in this case, and this addition amounts to a deprivation of Rickard's liberty and property interests in his good name and business reputation. See id. at 708-09, explaining the difference between Paul and Wisconsin v. Constantineau, 440 U.S. 433 (1971).

Other courts have recognized similar principles. Thus, in Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), cert. denied sub nom. Rashkind v. Marrero, 450 U.S. 913 (1981), publicized charges that a business establishment contained stolen merchandise led to a finding by the court that tangible interests other than mere reputation had been infringed upon. In

both Gilmour v. New York State Racing & Wagering Board, supra, 405 F. Supp. at 461, and Catrone v. Massachusetts State Racing Commission, supra, 404 F. Supp. at 770, state actions were found to bring the plaintiffs into disrepute and thus effectively deny their property and liberty interests in their good names and business reputations.

Similarly, the court in Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 446 (2d Cir. 1980), determined that a "stigmatizing" liberty interest deprivation occurs when an individual's good name, reputation, honor, or integrity are called into question. In McKnight v. Southeastern Pennsylvania Transportation Authority, 583 F.2d 1229, 1236-37 (3d Cir. 1978), the court established the test as whether the challenge to good name or reputation damages future employment prospects.

Cf. Willens v. University of Massachusetts, 570 F.2d 403 (1st Cir. 1978).

Rickard submits that the actions of the marine police in questioning his credentials and registration in front of potential customers has had the effect of damaging his potential business and thus destroying his property and liberty interests in his good name and reputation. This Court should permit recovery for this damage.

CONCLUSION

For the foregoing reasons this Court should grant a writ of certiorari to the Court of Appeals of New York.

Respectfully submitted,

Carl C. Banno
Banno, Landis & Pajion
146 Old Country Road
Mineola, New York 11501
516/746-5100

Counsel of Record
for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of February, 1983, I forwarded by first class mail, postage prepaid, three copies of the foregoing Petition for Writ of Certiorari to:

Edward G. McCabe
County Attorney of Nassau County
1 West Street
Mineola, New York 11501

Carl C. Banno
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146 Old Country Road
Mineola, New York 11501
516/746-5100

Counsel of Record
for Petitioner

A-1

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

AQUATIC TECHNICAL SERVICES, INC.,
Petitioner,

v.

COUNTY OF NASSAU, NASSAU
COUNTY POLICE DEPARTMENT
SAMUEL ROZZI, Commissioner
of Police, and FRANCIS T.
PURCELL, County Executive,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF NEW YORK

APPENDIX

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At a Trial Term, Part 24 of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Supreme Court Building, Mineola, New York, on the 15 day of September, 1981.

----------X

AQUATIC TECHNICAL SERVICES, INC., 26 Bayside Drive, Point Lookout, N. Y.,

Plaintiff,

-against-

Index No. 10246/78

JUDGMENT

COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT, SAMUEL ROZZI, COMMISSIONER OF POLICE, and FRANCIS T. PURCELL, County Executive, 1 West Street, Mineola, New York,

Defendants.

----------X

The above entitled action, having come on for trial before MR. JUSTICE HOWARD E. LEVITT, without a jury, at a Trial Term, Part 24 of this Court, held at the Court House, Supreme Court Drive, Mineola, New York, and the plaintiff

having appeared by its attorneys, BANNO, LANDI & PAJION, ESQS., by Carl Banno, Esq., of Counsel, and the defendants having appeared by their attorney, EDWARD G. McCABE, County Attorney of Nassau County, by Joseph T. Carney, Deputy County Attorney, of Counsel, and upon the testimony and evidence adduced at the said trial, and after due deliberation thereon, and upon the Memorandum Decision of MR. JUSTICE HOWARD E. LEVITT, dated August 10, 1981.

NOW, on motion of EDWARD G. McCABE, County Attorney of Nassau County by JOSEPH T. CARNEY, Deputy County Attorney, of Counsel, it is hereby

ORDERED, ADJUDGED and DECREED, that the action is dismissed, and it is further,

ORDERED, ADJUDGED and DECREED, that the defendants, COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT, SAMUEL ROZZI, Commissioner of Police, and FRANCIS T.

PURCELL, County Executive, residing at 1 West Street, Mineola, New York, have judgment against AQUATIC TECHNICAL SERVICES, INC., located at 26 Bayside Drive, Point Lookout, New York, in the amount of $150.00, for costs and disbursements in this action.

E N T E R,

/s/ HOWARD E. LEVITT

J.S.C.

MEMORANDUM

SUPREME COURT, NASSAU COUNTY

AQUATIC TECHNICAL SERVICES, INC., Plaintiff, VS. COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT, SAMUEL ROZZI, Commissioner of Police and FRANCIS T. PURCELL, County Executive, Defendants.	TRIAL TERM PART 24 BY LEVITT, J. DATED August 10, 1981 Index No. 10246/78

Plaintiff, a private marine towing and salvage service, whose sole stockholder and operator (Robert S. Rickard) is the moving force in this proceeding, seeks an order of this Court permanently restraining and enjoining the defendants from pursuing distress towing assistance operations on the navigable waters of the County of Nassau. In addition, plaintiff seeks an order declaring the acts and policies of the defendant void, illegal and unconstitutional

pursuant to § 340 of the General Business Law, § 51 of the General Municipal Law, Article VIII § 1 and Article I § 7 of the Constitution of the State of New York and the Fourteenth Amendment of the United States Constitution.

The Marine Bureau of the defendant, Nassau County Police Department, is, hierarchically, a subdivision of the Traffic Services subdivision of the Patrol Division of the Office of the Chief of Patrol. "The Marine Bureau is responsible for the operation of boats on those navigable waters under the jurisdiction of the County of Nassau and is further charged with the protection of persons and property on and adjacent to said waterways, including islands therein, and the enforcement of all laws, regulations, and ordinances." (Rules and Regulations, Art. XII, Rule 4, § 3(d), Nassau County Police Department).

As stated above, plaintiff is in the business of marine towing and salvage, plying its trade on the navigable waters of the south shore of Long Island. The president and sole stockholder of the plaintiff corporation is in possession of the necessary license, issued by the United States Coast Guard, to operate such business.

It is plaintiff's position that when a member of the defendant's Marine Bureau, comes upon a distressed vessel in other than an "emergency" situation, those aboard such vessel should be advised to solicit assistance from a private towing company, such as the plaintiff; or, in the alternative, that the defendant directly notify a private towing company of the situation. This posture is based upon plaintiff's contention that the defendant is wasting taxpayer's funds by coming to the aid of every boat that requests aid and as a consequence

cannot allocate sufficient time to actual law enforcement, i.e., the issuance of summonses for speeding and other offenses. The result of defendant's concentration upon rescue operations, plaintiff believes, creates a towing monopoly for the defendant to the preclusion of the plaintiff (the only private tower presently contending for the trade).

Defendant takes the position that members of the Marine Bureau are mandated, as part of their police duties, to come to the aid of any vessel in distress, and/or the persons aboard such vessel; and that to limit their rescue activites to "emergency" situations would be totally impractical.

Throughout history there has been a duty, legal and moral, on boatmen to render aid to those in distress. Compliance with this duty has been encouraged by

systems of reward and punishment. As early as nine hundred years before the Christian era, a salvor of a distressed or wrecked ship was rewarded for his efforts through salvage awards (M. Norris, The Law of Salvage, § 5 (1958)). "The maritime law, for the purpose of public policy and for the advantage of trade, imposes a liability upon the thing saved; a liability which is a special consequence arising out of the character of mercantile enterprise, the nature of the sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything, except ships or goods in peril at sea." (Falcke v. The Scottish Imperial Insurance Co., 34 Ch. D. 234, at 248).

Plaintiff chose to embark upon a commercial enterprise for the rendering of

assistance in a field which historically has placed a moral and legal duty upon every boat person to render assistance, with or without compensation. In the United States, as early as 1912, there was a statutory duty for the master or person in charge of a vessel to render assistance to every person found at sea in danger of being lost, and "if he fails to do so, he shall upon conviction be liable to a penalty of not exceeding $1,000.00 or imprisonment for a term not exceeding two years, or both." (Salvage Act of 1912, 46 USC 728). To date, however, prosecution has been non-existent under this Act. Thus, the master or person in charge of a vessel may escape the duty of aiding fellow boat persons without fear of statutory penalties. The relative mildness of the penalties and the fact there are no prosecutions recorded to date seems to suggest that the duty on the

part of fellow pleasure boaters is discreetly overlooked when upon the high seas or in territorial waters (2 California Western International Law Journal (1971).

The specific rules and regulations cited earlier are not the exclusive basis for defendant's pleasure boat distress towing operations. Under New York law, "it shall be the duty of every master or pilot of any vessel [propelled by machinery] to render such assistance as he can possibly give to any other vessel coming under his observation and being in distress on account of accident, collision, or otherwise." (Navigation Law, Art. 4, § 41(3)). Also, Marine Bureau order number 5 issued on March 24, 1978 states in part:

> 1. Members of the Marine Bureau will strictly adhere to the policy of towing disabled vessels only as far as the nearest point of safety. A point of safety will be considered as any location where a telephone and a safe mooring

is available to the occupants of the vessel.

2. Any further assistance which is required will be the responsibility of the occupants of the vessel, either through commercial enterprise or other private arrangements. At no time, other than an extreme emergency situation, will a member of the Marine Bureau tow a disabled vessel beyond the nearest point of safety.

In addition, the preface to the Rules and Regulations of the Nassau County Police Department states that "written charges will be preferred against any member of the Police Department or Police Force who violates these Rules and Regulations, unless otherwise directed by the Commissioner of Police."

In the case at bar, defendant is under a statutory duty to render assistance in all circumstances within the parameters of its jurisdiction as well as those areas reasonably outside the jurisdiction, so far

as this can be done without serious danger to its own vessels or crews. Furthermore, the defendant's personnel are restricted, unlike other boat persons, to bring the disabled vessel only as far as "the nearest point of safety," except where such nearest point would force the disabled vessel to confront further marine peril.

Plaintiff's contention that defendant's Marine Bureau should aid vessels only under emergency situations is implausible. This Court finds that there is a high probability that boat persons might not aid fellow boat persons in distress; thus, defendant's Marine Bureau, provides a necessary function upon the jurisdictional waters of Nassau County. Furthermore, plaintiff's demand for defendant to act only in emergency situations is an amorphous limitation that cannot be judicially mandated. There is no rational basis for distinguishing

between an emergency situation and a non-emergency situation. An emergency situation is defined in New York Jurisprudence Words and Phrases 237, as "unforeseen occurrences or conditions," a definition as indefinite as the term itself.

In The Mira A. Platt, 31 F. 572 (1887), the Court determined that a distress signal of any kind, including the mere waving of a hand, is usually regarded as indicating the state of mind of those on board the vessel and their apprehensiveness with respect to the unsafe condition of their vessel. Such a signal of distress is sufficient cause for other boat persons, including the defendant, to deem the vessel in peril.

Further, if there is an inability to navigate or control the direction of a vessel, due to machinery failure or other damage taking place at sea or away from a safe area, it will place the vessel in

greater peril. A drifting vessel is a menace to navigation and to herself. If allowed to drift, a disabled vessel may eventually meet with disaster by washing up on a beach, shoal, rocks, breakwater, etc., or come into collision with another vessel or stationary object. Should a squall or storm arise (and such can occur instantaneously) there is always the added likelihood of the vessel receiving serious damage, if not total loss, by capsizing or sinking.

The responsibility of aiding a distressed vessel applies to all persons in control of any type of vessel. Such is necessary to provide a larger, more meaningful scope to the duty. If the responsibility were to be interpreted to apply only to commercial towing vessels or only to those situations coming within an artificially defined standard of "emergency," individuals owing [sic] pleasure craft would most often

not only be relieved of the duty to their fellow boat persons but would themselves be placed in greater jeopardy. Defendant, by expressly limiting its responsibilities to towing to the nearest point of safety, has given plaintiff the opportunity of performing its proper function of serving the convenience of boaters.

The Court finds that defendant's Marine Bureau, through its personnel, is fully complying with its legal and moral duties in the maritime community without recourse to monetary reward. Plaintiff, however, has failed to show how the maritime community and the public at large would benefit from a determination by this Court that in towing pleasure boats in distress the defendant's Marine Bureau does not serve a necessary function upon the navigable waters of Nassau County and that the Marine Bureau should, thus, be enjoined from such functions.

Further, it was not able to show how it could itself assure the maritime community that all required assistance would be rendered in the absence of the distress services performed by the defendant.

Plaintiff also relies upon the fourteenth amendment to the United States Constitution and Article I § 7 of the New York State Constitution, contending that the defendants took its private property without just compensation.

In Story v. New York El.R.Co., 90 NY 122, 168, the Court held that to constitute a taking, "it is sufficient that the person claiming compensation has some right or privilege, secured by grant, in the property appropriated to the public use, which right or privilege is destroyed, injured, or abridged by such appropriation." In the case at bar, the plaintiff did not demonstrate a right or privilege in the property.

Potential profit from towing is not property. Thus, it cannot be determined that a property right or privilege was destroyed, injured, or abridged. Furthermore, as held in Rose v. State of New York, 24 NY 2d 80, 87, just compensation "is properly measured by" assessing the actual loss to the owner of the real property. Mere personalty, as in the instant case, is not compensable upon appropriation (City of Buffalo v. J. W. Clement Co., 28 NY 2d 241). Thus, even if plaintiff suffered damage due to the loss of prospective business, such possible future loss of prospective business is not a "taking" in a constitutional sense.

The plaintiff further relies upon the New York State Constitution, Article VIII § 1 contending that free towing and salvage by the defendants constitutes a gift or loan of property to and in aid of individual boat owners. This contention lacks merit.

In Hess v. Board of Educ. of Cent. Sch. Dist. No. 1 of Townships [sic] of Liberty, 41 AD2d 151, it was held that an expenditure of public funds is constitutionally prohibited absent an express statutory provision to the contrary. In this case the express statutory provision is contained in the Navigation Law, Article 4, § 41(3), which places a duty upon every sailor to render aid, if possible, to any other vessel propelled by machinery observed and being in distress.

Plaintiff additionally claims that the defendants have maliciously and unlawfully entered into an agreement, combination, and conspiracy in violation of § 340 of the General Business Law, to prevent the plaintiff from carrying on its business of providing towing and salvage services, for the purpose of damaging plaintiff in its business and forcing its customers and

potential customers to use the free services of the defendants all with the intent to infringe upon and destroy the business of the plaintiff.

This claim must fail. No evidence was presented by the plaintiff to prove that the defendants' actions have been other than in compliance with federal and state statutory duties or their municipal police duties.

Finally, the plaintiff argues that the defendants are in violation of § 51 of the General Municipal Law (Prosecution of officers for illegal acts) in that the free towing and salvage is unnecessary, superfluous, illegal and a waste of taxpayer's money; and that commercial salvors are ready and available to all boaters to provide quick, safe and efficient services.

Under this statute, a taxpayer is required to show public injury in order to have standing (Bloom v. Mayor of City of

New York, 28 NY 2d 952). Furthermore, a taxpayer's action may only be maintained to prevent waste or to prevent an illegal act (Campbell v. City of New York, 244 NY 317). The plaintiff herein seeks to enjoin the defendants from conducting distress towing assistance operations on the navigable waters within the jurisdiction of Nassau County. However, the plaintiff has failed to show any public injury. A taxpayer's action to prevent waste by showing that there was public injury rather than direct injury solely to the plaintiff is the proper action to be pursued.

CONCLUSION

The acts of the defendants claimed to be illegal, i.e. towing of boats in distress, are authorized by statute and encouraged under the Maritime Law. If, however, employees of the defendants in individual

instances tow boats further than the nearest point of safety, there is a remedy through disciplinary action as set forth in the rules and regulations of the Nassau County Police Department.

The defendant's Marine Bureau, should not be required to predetermine whether a distress situation constitutes an existing or potential emergency and to evaluate whether it may possibly be exposing public funds to waste by not contacting a private salvage or towing company. Any delay may prove fatal to a distressed vessel.

> "Never trust her at anytime,
> when the calm sea shows her
> false alluring smile." -
> Titus Lucretius Carus
> 99-55 B.C. [DeRerum Natura
> (On the Nature of Things)
> Bk. I, 1.1 (Invocation)]

Accordingly, plaintiff's complaint is dismissed in its entirety.

The foregoing constitutes the decision of this Court pursuant to CPLR 4213.

Settle judgment.

/s/ Howard E. Levitt
J. S. C.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on August 2, 1982

HON. VINCENT D. DAMIANI, Justice Presiding,
HON. FRANK D. O'CONNOR,)
HON. WILLIAM C. THOMPSON,) Associate
HON. RICHARD A. BROWN.) Justices

Aquatic Technical Services, Inc., Appellant, v. County of Nassau et al., Respondents.	Order on Appeal from Judgment Civil Action or Proceeding

In the above entitled cause, the above named Aquatic Technical Services, Inc., plaintiff, having appealed to this court from a judgment of the Supreme Court, Nassau County, dated September 15, 1981; and the said appeal having been argued by Carl C. Banno, Esq., of counsel for the appellant, and argued by Kathryn Driscoll Hopkins Esq., of counsel for the respondent,

and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed, with cost for reasons stated in the opinion of Justice LEVITT at Trial Term.

Enter:

IRVING N. SELKIN

Clerk of the
Appellate Division

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held
at Court of Appeals Hall
in the City of Albany on
the sixteenth day of
November A.D. 1982

PRESENT, HON. LAWRENCE H. COOKE, Chief
Judge, presiding.

---

2 Mo. No. 1177 SSD 134

Aquatic Technical Services, Inc.,

Appellant,

vs.

County of Nassau, Nassau County
Police Department, et al.,

Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground

that no substantial constitutional question is directly involved.

/s/ Joseph W. Bellacosa

Joseph W. Bellacosa
Clerk of the Court

Office-Supreme Court, U.S.
FILED
MAR 11 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1364

IN THE

Supreme Court of the United States

October Term, 1982

AQUATIC TECHNICAL SERVICES INC.,
Petitioner,

against

COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT, SAMUEL ROZZI, Commissioner of of Police, and FRANCIS T. PURCELL, County Executive,
Respondents.

Brief for Respondents in Opposition to Petition for Writ of Certiorari to the Court of Appeals of the State of New York and Appendix

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Attorney for Respondents
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(516) 535-3005

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982.

AQUATIC TECHNICAL SERVICES Inc.

Petitioner,

against

COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT, SAMUEL ROZZI, Commissioner of Police and FRANCIS T. PURCELL, County Executive,

Respondents.

Brief for Respondents in Opposition to Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

Opinions in the Courts Below.

The judgment of the Supreme Court of the State of New York, County of Nassau, Trial Term, dated September 15, 1981, dismissing the action with costs and disbursements, is set out in petitioner's appendix at pages A-3 through A-5.* The memorandum decision of that same court, dismissing the complaint, dated August 10, 1981, which is also unreported, is set out in petitioner's appendix at pages A-6 to A-24.

*(A.)—Refers to page numbers in the appendix of petitioner contained in the Petition for Writ of Certiorari to the Supreme Court of the United States, unless otherwise indicated.

The order of the Appellate Division, Second Judicial Department, dated August 2, 1982, unanimously affirming the judgment of the Supreme Court of the State of New York, County of Nassau, with costs, is reported at 89 A. D. 2d 841 (2d Dept. 1982) and is also set out in the petitioner's appendix at pages A-25 to A-26.

The order of the Court of Appeals of the State of New York, dismissing the appeal as of right by the court *sua sponte* upon the ground that no substantial constitutional question is directly involved, is reported at 58 N. Y. 2d 689 (1982) and is set out at pages A-27 through A-28 in the petition and with notice of entry thereof at pages RA-1 through RA-2* of respondent's appendix. To date, no motion for leave to appeal to the Court of Appeals of the State of New York has been made.

Jurisdictional Statement.

This Court is without jurisdiction to hear the instant matter since there has been no final judgment in the New York State Court of Appeals, although jurisdiction is alleged pursuant to 28 U. S. C. 1257(3).

Questions Presented for the Court to Review.

Whether this Honorable Court has jurisdiction to entertain the instant matter.

Whether petitioner has cause to complain since respondents, in the valid exercise of their police powers, have a right to regulate the abutting navigable and tidal waters of Nassau County.

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*(RA)—Refers to page numbers in respondents' appendix herein, unless otherwise indicated.

Whether the towing operations infringed upon petitioner's constitutionally protected liberty and property rights.

Constitutional Provision Involved.

The due process clause of the 14th Amendment to the United States Constitution is the constitutional provision involved in the within case and is set forth in pertinent part at page "2" of the petition.

Statement of the Case.

The within action was commenced in the Supreme Court of the State of New York, County of Nassau, by service of a summons and complaint on or about July 14, 1978. Issue was joined by service of a verified answer on or about August 7, 1978.

This is an action for a permanent injunction and for monetary damages based upon alleged violations by the respondents of petitioner's constitutional rights under the 14th Amendment of the United States Constitution and Article 1, Section 6, and Article 8, Section 1, of the New York State Constitution and alleged violations by respondents of Section 51 of the General Municipal Law and Section 340 of the General Business Law of the State of New York, arising by reason of the respondents' towing of disabled vessels.

An order to show cause for a preliminary injunction, dated July 19, 1978, was served by the petitioner. An affidavit of Martin Jellema, dated August 4, 1978, was thereafter submitted by the respondents in opposition. An order denying petitioner's request for a preliminary injunction, dated August 14, 1978, was rendered by the

Honorable Justice Sullivan of the Supreme Court of the State of New York, County of Nassau.

The non-jury trial in this matter was held before the Honorable Howard E. Levitt, Justice of the Supreme Court of the State of New York, County of Nassau, on April 22nd, 23rd and 27th, 1981. The Justice reserved decision. Thereafter, on August 10, 1981, Justice Levitt issued a memorandum decision dismissing the complaint in its entirety. Judgment was thereafter rendered respondents against the petitioner with costs and disbursements in the action. Said judgment was dated September 15, 1981.

An appeal to the Appellate Division of the Supreme Court of the State of New York was taken by the petitioner by notice of appeal dated October 9, 1981. The appeal was perfected and the Appellate Division issued an order on August 2, 1982, ordering that the judgment appealed from was unanimously affirmed with costs.

The petitioner commenced the within action seeking to enjoin the Nassau County Police Department Marine Bureau from performing the duties of said Bureau, claiming that the Marine Bureau was causing great expense to the taxpayers of Nassau County. Petitioner further claimed that the Marine Bureau, in providing towing to disabled vessels, was violating the Constitution of the State of New York and the United States Constitution, allegedly to the detriment of the police function of law enforcement and also allegedly depriving petitioner of his rights under the Constitution of the United States.

The Marine Bureau is an integral part of the Nassau County Police Department. The Marine Bureau is charged

with the operation of boats on the navigable waters under the jurisdiction of the County of Nassau for the protection of persons and property adjacent to said waterways and the enforcement of all laws, regulations and ordinances.

It has a fleet of seven different types of motorboats with inboard motors ranging in length from 31 feet to 45 feet. It has four whalers, each of which is 17 feet in length and having outboard motors, and three fishing boats, each of which is 20 feet in length without outboard motors. Each boat is fully equipped with first aid material, fire fighting material, body baskets for the removal of deceased persons, and all other equipment which may be needed for the giving of first aid and assistance to the occupants of distressed or disabled vessels, and for the preservation of life and property.

The Marine Bureau consists of an inspector, a captain, two lieutenants, five sergeants and 64 police officers, all of whom are highly trained to perform all of the duties and to meet and cope with all emergencies incumbent upon them as operators and crew members of the Marine Bureau fleet. The operations of the Marine Bureau are primarily confined to the inland waterways in Nassau County running from the New York City line to the Suffolk County line, both on the north shore and on the south shore. The members of the Marine Bureau are mandated, as part of their police duties, to come to the aid of any vessels in distress and/or the person or persons aboard such vessel. In the event a member of the Marine Bureau has reason to believe that the distressed vessel is at the mercy of the elements, such distressed vessel will be towed to the nearest point of safety where its occupants can be safely put ashore. From such nearest point of safety, the occupants of the distressed vessel can then contact a private

towing company to render such services as may be necessary.

A notice of appeal, purportedly as of right, was thereafter filed to the Court of Appeals of the State of New York. Said appeal was dismissed by the Court of Appeals *sua sponte* upon the ground that no substantial constitutional question is directly involved. The petitioner did not make a motion for leave to appeal to the Court of Appeals of the State of New York within the time limitations set forth in the New York State Civil Practice Law and Rules §5602. Thereafter, petitioner served respondents with the petition for writ of certiorari to this Court.

ARGUMENT.

This Honorable Court has no jurisdiction to entertain the instant matter.

Petitioner has invoked this Court's jurisdiction pursuant to 28 U. S. C. §1257(3). It is the contention of the respondents that the petition should be dismissed for lack of jurisdiction.

On September 15, 1981, a final judgment was entered in the Supreme Court, Nassau County, dismissing the within action (A. 3-5). Petitioner then appealed from said judgment to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. That court ordered that the judgment appealed from of the Supreme Court, Nassau County, dated September 15, 1981, be unanimously affirmed with costs for reasons stated in the opinion of Mr. Justice Levitt at Trial Term. The order of the Appellate Division of the State of New York, Second Judicial Department, was entered on

August 2, 1982 (A. 25, 26), and served with notice of entry on August 9, 1982, by respondents.

Under the New York Civil Practice Law and Rules, an appellant desiring to appeal to the Court of Appeals of the State of New York may appeal as of right pursuant to CPLR 5601 or by permission for leave to appeal pursuant to CPLR 5602, depending upon the nature and results of the prior court orders. In the case at bar, petitioner filed a notice of appeal as of right to the New York State Court of Appeals purportedly pursuant to CPLR 5601(b)(1). The New York State Court of Appeals, on November 16, 1982, dismissed that appeal as of right *sua sponte* upon the ground that there is no substantial constitutional question directly involved (A. 27, 28). The order of the New York State Court of Appeals, dated November 16, 1982, with notice of entry, was served upon petitioner's appellate counsel and attorney of record on November 19, 1982. A copy of said order, together with affidavit of service is annexed to the instant brief for respondents and marked Exhibit "RA 1." Petitioner failed to move for leave to appeal to the New York State Court of Appeals at any stage of the instant proceedings prior to petitioner's petition for certiorari in this Court.

The law is clear that, for petitioner to invoke the jurisdiction of this Court, the petitioner is required to pursue the correct avenue for review in the New York State court. In the case at bar, petitioner was required to move for leave to appeal to the New York State Court of Appeals under CPLR 5602. Petitioner had notice, pursuant to the order of the New York State Court of Appeals, dated November 16, 1982, that his appeal as of right was dismissed upon the ground that there was no substantial constitutional question involved. Petitioner, pursuant to

CPLR 5514 and CPLR 5602, could have timely moved for permission for leave to appeal to the New York State Court of Appeals, which time has expired. Clearly, the order of the New York State Court of Appeals, dated November 16, 1982, did not in and of itself affirm or deny the validity of a lower court judgment. *Minneapolis S.P. & S.S.M.R. Co. v. Rock,* 279 U. S. 410, 73 L. Ed. 766, 49 S. Ct. 363 (1929); *Cheasapeake & O.R. Co. v. Mihas,* 280 U. S. 102, 74 L. Ed. 207, 50 S. Ct. 42 (1929).

Simply put, petitioner's failure to seek discretionary review by a motion for leave to appeal to the New York State Court of Appeals, even though the state court has refused to hear the appeal as of right, results in the legal conclusion that the judgment herein sought to be reviewed was not that of the highest court of the State of New York in which a decision could be had. Thus, it is respectfully submitted that this Court has no jurisdiction of this case. *Gotthilf v. Sills,* 375 U. S. 79, 11 L. Ed. 2d 159, 84 S. Ct. 187 (1963); *McMaster v. Gould,* 276 U. S. 284, 72 L. Ed. 574, 48 S. Ct. 299 (1928); *Matthews v. Huwe,* 269 U. S. 262, 70 L. Ed. 266, 46 S. Ct. 108 (1925); 32A Am. Jur. 2d, Federal Practice and Procedure, Section 615, page 134, revised 1982.

Moreover, this court has consistently adhered to the self-imposed principle that it will not review a state court's judgment based upon an adequate and independent non-federal ground even though a federal question may be involved and perhaps wrongly decided. *Murdock v. Memphis,* 20 Wall. 590, 636, 22 L. Ed. 429 (1875); *Berea College v. Kentucky,* 211 U. S. 45, 53 L. Ed. 81, 29 S. Ct. 33 (1908); *Fox Film Corp. v. Muller,* 296 U. S. 207, 80 L. Ed. 158, 56 S. Ct. 183 (1935). While it is clear that this Court must decide for itself whether the non-federal

grounds adequately support the state judgment, a review of the memorandum decision of Mr. Justice Levitt of the Supreme Court, Nassau County, dated August 10, 1981 (A. 6-24), clearly and unambiguously details adequate support for the state judgment upon adequate and independent non-federal grounds so as to warrant a dismissal of the instant petition.

Furthermore, it is essential to the jurisdiction of this Court, under 28 U. S. C. §1257(3), that a substantial federal question must be properly raised in the state court proceedings. The proffered federal question by the petitioner herein is absolutely devoid of merit so as to be frivolous. It is respondents' contention that the alleged federal question is insubstantial and is a further ground for denial of the petition for writ of certiorari. *Zucht v. King,* 260 U. S. 174, 67 L. Ed. 194, 43 S. Ct. 24 (1922); *Palmer Oil Corp. v. Amerada Corp.*, 343 U. S. 390, 96 L. Ed. 1022, 72 S. Ct. 842 (1952).

In sum, it is the position of respondents that, for all the reasons stated hereinabove, the petition for certiorari should be dismissed on jurisdictional grounds.

Petitioner has no cause to complain since respondents, in the valid exercise of their police powers, have a right to regulate the abutting navigable and tidal waters of Nassau County.

Nassau County was established by an act of the State Legislature in 1898 (L. 1898, Ch. 588). The areas of Hempstead and North Hempstead were originally known only as North Hempstead, and were erected by the Kieft Patent of 1644, the Nichols Patent of 1666 and the Dongan Patent of 1685. The south shore boundaries

established by the patents extend to the high waterline of the Atlantic Ocean. The north shore boundaries extend to the waterline of Long Island Sound, except as to the areas known as Manhasset Bay and Cold Spring Harbor. See the cases of *Grace v. Town of North Hempstead,* 166 App. Div. 844 (2d Dept. 1915), aff'd 220 N. Y. 628 (1917), and *Tiffany v. Town of Oyster Bay,* 209 N. Y. 1 (1913), wherein the court held that local jurisdiction over the bay and harbor is derived through the original patents which grant to the local body ownership in the beds of these waters. Regarding title to water beds (see *Rogers v. Jones,* 1 Wend. 237).

See, also, State Law §7-a for jurisdiction and ownership of offshore waters and lands thereunder. Respondents submit that, in addition to navigable and tidal water areas, the County of Nassau has jurisdiction with respect to certain offshore waters when it is performing police power functions.

In 1691, the Legislature of the Province of New York confirmed the colonial patents. Article 1, Section 14, of the New York State Constitution and the predecessor constitutional enactments reaffirmed the viability of the colonial patents. The Legislature of the State of New York, pursuant to the constitutional mandate giving due deference to the colonial patents, has conferred upon the County of Nassau the right to regulate their abutting navigable and tidal waters.

In 1925, the New York State Legislature enacted the Nassau County Police Act, Chapter 451, Laws of 1925, amended by Chapter 3, Laws of 1926, and further amended by Chapter 513, Laws of 1928. The Nassau County Police Act, as it was popularly known, was repealed by virtue of Chapter 272 of the Laws of 1939, the

Nassau County Administrative Code. See Section 26-14.0, Section 2.

Chapter 451, Laws of 1925, §14, entitled "Detail to duty" authorized the Nassau County Police to patrol such parts of the county, "to such rivers, creeks and harbors therein * * *" Section 20 thereof, entitled "Duties of police department and police force" of the Nassau County Police Act, *inter alia,* authorized the police to protect the rights of persons and of property, to guard the public health, to remove nuisances, to assist, advise and protect immigrants, strangers and travellers. Section 21 thereof, entitled "Entry where felony is suspected, of such act authorized the boarding of any ship, boat or vessels within the police district where a felony is suspected."

With the repeal of the Nassau County Police Act, by the enactment of the Nassau County Administrative Code, Chapter 272, Laws of 1939, effective April 12, 1939, coupled with the prior legislative enactment of the County Government Law of Nassau County, Chapter 879, Laws of 1936, effective January 1, 1938, establishing a department of police, Article VIII thereof, the Nassau County Police Department was and is vested with parallel and more extensive authority than under the Nassau County Police Act.

Section 22-10.0 of the Nassau County Administrative Code authorizes the Nassau County Board of Supervisors to amend or supplement any provision of the Nassau County Administrative Code. Under Section 8-15.0 of the Nassau County Administrative Code, amended by Local Law No. 2-1951, enacted by the Nassau County Board of Supervisors, the said Board included in the tax to be levied upon the real estate in the County, the annual expense of

the maintenance, operation and personal services of the different bureaus, divisions or offices which serve the County, among which is included the Marine Bureau of the Nassau County Police Department.

Section 22-3.0 of the Nassau County Administrative Code authorizes the head of an agency to make rules or regulations for the conduct of his office or department. In Section 22-1.0 of the Nassau County Administrative Code, subdivision "9," the term "Agency" is defined as any department, bureau or office of the County of Nassau. All courts shall take judicial notice of all laws contained in the said Administrative Code and of all rules and regulations adopted pursuant to the Administrative Code, as provided in Section 22-11.0 of the Administrative Code.

Pursuant to Section 8-12.0 of said Code, the Commissioner of Police may detail members of the police force to such parts of the County as he may deem advisable. Section 8-15.0 authorizes the Board of Supervisors to annually raise money for the bureaus and the divisions of the Police department, including the Marine Division.

Section 8-22.5 of the Nassau County Administrative Code sets forth the duties of the Police Department which include, *inter alia*, protecting the rights of persons and property, removing nuisances existing in public places, regulating the movement of vehicular traffic in places, and guarding the public health. Pursuant to Section 8-13.0, the Commissioner of Police has the power to discipline a member of the police force for neglect of duty.

Pursuant to Section 8-3.0 of the Nassau County Administrative Code, the Commissioner of Police may promulgate rules and regulations for the purposes of carrying

out the functions of the Police Department. It is well established that a State, in the exercise of its police power, may establish rules applicable on land and water within its territorial limits even though these rules may incidentally affect maritime affairs. *Askew v. American Waterways Operators,* 411 U. S. 325, 93 S. Ct. 1590, 36 L. Ed. 2d 280 (1973), reh. den. 412 U. S. 933, 93 S. Ct. 2746, 37 L. Ed. 2d 162 (1973).

With the foregoing legislative history, this Court is asked to take judicial notice of Rule 4(c) of the Rules and Regulations of the Nassau County Police Department, adopted by the Police Commissioner, which reads as follows:

> "The Marine Bureau is charged with the operation of boats on the navigable waters under the jurisdiction of the County of Nassau, and is further charged with the protection of persons and property on and adjacent to said Waterways, including islands therein, and the enforcement of all laws, regulations, and ordinances."

We, therefore, have a delegation of police powers by the State to the County of Nassau. Such police power is being properly exercised. The police power exercised for the common good was duly recognized in *People v. King,* 110 N. Y. 418 (1888). A similar ruling was made in *People v. Nahman,* 298 N. Y. 95 (1948).

Police power is one of the broadest powers and its exercise is limited only by the requirement that there be a reasonable relationship to the public health or welfare and that it not be exercised arbitrarily. The facts in the within matter will clearly indicate that the powers exercised by the

Marine Bureau have a reasonable relationship to the preservation of life and property, which is strongly related to the public health or welfare, and such police power exercised by the Marine Bureau is not exercised arbitrarily.

Respondents respectfully submit that the cases cited in the petition have no bearing on the case at bar. The Marine Bureau is exercising a proper police function in protecting the lives and property of the residents and visitors of Nassau County. Petitioner is not complaining of a legislative regulation of its *own* activities by the Police Department but, rather, petitioner complains about what the respondents are doing themselves.

Petitioner goes further in his petition to state that government may not engage in private enterprise. Two cases are cited for this proposition. *Ohio v. Helvering,* 292 U. S. 360, 78 L. Ed. 1307, 54 S. Ct. 725 (1933), a case dealing with taxation of liquor distribution, and *Goldblatt v. Town of Hempstead,* 369 U. S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962).

The issue in *Ohio v. Helvering* was whether the state government could be required to pay taxes on the money it had made in the business of distribution of liquor. (It is interesting to note that there are states where the government is engaged in the retail business of selling liquor *to the exclusion of all others.*)

In the case at bar, the Marine Bureau of the Nassau County Police Department does not charge a fee when it provides towing to disabled vessels. This service is provided as part of the duties of the Marine Bureau police.

Petitioner also implies that the members of the Marine Bureau police are wrongfully accepting gratuities and/or

money from the people they assist. Petitioner also asserts that the Marine Police were harassing him by questioning his license in front of others. The police have the obligation and duty to do so and even assuming *arguendo* that their questioning could be considered harassment, it is respectfully submitted that the proper procedure for the petitioner to employ is to bring the action to the attention of the Commissioner of Police for disciplinary measures (Nassau County Administrative Code §8-13.0).

In regard to petitioner's allegation that the Marine Bureau police were providing towing to disabled vessels outside the County of Nassau, this Honorable Court is respectfully referred to the fact that Captain Martin Jellema of the Marine Police Bureau states under oath that he cannot conceive of the Bureau towing disabled vessels outside of the County. However, Captain Jellema did state that if a United States Coast Guard boat were to need assistance in towing disabled vessels, the Marine Bureau would assist at their request.

A review of the towing and salvage provisions of the United States Coast Guard Regulations shows that the Coast Guard may render assistance to vessels in distress including towage. In regard to the role of a private operator, the United States Coast Guard may turn the tow over to a private operator if the assisted vessel agrees, which is the same procedure employed by the Marine Bureau.

Furthermore, in most instances cited by the petitioner as being violative of law, the United States Coast Guard and/or Coast Guard Auxiliary was involved and worked hand in hand with the Marine Bureau. In one instance, the Coast Guard asked if the Marine police were going in the direction of a particular boat. The Marine police were not

going in that direction, so the Coast Guard said that they would handle the situation. This is another example of the Marine police working hand in hand with the Coast Guard.

Also interesting to note is the reference to the Coast Guard Auxiliary taking a boat to the Jones Beach fishing pier and the Marine police taking it from there. It is obvious, even to the novice, that the Coast Guard and the Marine Bureau work hand in hand.

A witness for the petitioner even stated that, in 90 percent of the responses to disabled vessels, the Coast Guard will do the towing or whatever is necessary to make sure the vessel is safe.

Respondents respectfully submit that the record will bear out the fact that the United States Coast Guard has the primary role in most instances, and the Marine Bureau police have the secondary role in assisting the United States Coast Guard.

In reviewing the provisions of federal law relative to the United States Coast Guard, as set forth in 14 U.S.C. §826, it is clear that the County must render assistance to the United States Coast Guard or be in violation of the federal law. 14 U.S.C. §826 provides that the United States Coast Guard may utilize, for any purpose incident to carrying out its functions and duties, any motor boat placed at its disposition for such purpose by any state or political subdivision thereof. Further, 14 U.S.C. §1 sets forth the duties of the United States Coast Guard which include enforcing regulations for the promotion of safety of life and property on the high seas and on waters, and to develop,

establish, maintain and operate, with due regard to requirements of national defense, aid to maritime navigation and rescue facilities for the promotion of safety on the high seas and waters. 14 U.S.C. §822 deals with the purpose of the Coast Guard Auxiliary which, *inter alia,* is to promote safety and to effect rescue on high seas and navigable waters. Section 81 of 14 U.S.C. gives the United States Coast Guard authority to aid navigation. Section 88 of 14 U.S.C. involves saving life and property and provides that the United States Coast Guard may tow into port sunken or floating dangers to navigation.

A review of the federal and state law, as set forth herein, clearly shows that the Marine Bureau of the Nassau County Police Department is acting in accordance with good and acceptable law and, in fact, would be in violation of the laws should it stop providing aid to distressed vessels.

The function of the Police Department is multi-faceted. Query: Does petitioner suggest that, on the highway for example, the police may only ticket a drunk driver and not pull the injured body of the drunk driver's victim to the side of the road? Of course not.

The petitioner submits that the Marine Police Bureau should be permitted to assist vessels only when they are in emergency situations (emergency as defined by petitioner). Petitioner would have the Marine police patrol the waters, responding to vessels in distress. If the vessel were in an "emergency" situation, the Marine police would then be permitted to assist. If not, under petitioner's submission, the Marine police would have the responsibility of calling in a commercial tower and then either waiting to make sure he responded or going back to check on the vessel.

This would be an overbearing burden on the police officers, first in determining an "emergency" situation and second in making sure a commercial tower had responded to the scene. This is totally impractical and could result in further litigation.

Perhaps the best analysis of the constitutionality of the Marine Bureau in towing disabled vessels can be found in the memorandum decision of the Honorable Justice Howard E. Levitt, of the Supreme Court of the State of New York, County of Nassau, set forth in petitioner's appendix at page A-23.

> "Never trust her at anytime, when the calm sea shows her false alluring smile."—Titus Lucretius Carus, 99-55 B.C. [DeRerum Natura (On the Nature of Things) Bk. I, 1.1 (Invocation)]

The towing operations do not infringe upon the petitioner's constitutionally protected liberty and property interests.

Respondents respectfully submit that any towing performed by the Marine Bureau is in accordance with the law and, in any event, does not constitute an infringement upon petitioner's constitutionally protected liberty and property interests.

The petitioner herein claims that, by the Marine Bureau's towing of vessels in distress, it is infringing upon the petitioner's constitutional rights. This argument is devoid of logic. As stated above, the Marine Bureau police tow to the nearest safe harbor. From there, the parties can contact a commercial tower of their choice or, as is often the case, call their own docking facilities who, in certain cases, provide towing services as part of their dockage fee.

The police have never arrogated to themselves the right to exclude the petitioner from his trade. Petitioner has towed boats from Short Beach, and there has been no testimony indicating the police actually ordered the petitioner not to tow. To the extent that any choices are made, private owners made them, and they were free to avail themselves of proper government services such as the assistance to a safe harbor. If the petitioner was only able to obtain the towing job back to the home port and the boat owner, in fact, requested someone else's assistance, this, too, is not the fault of the Marine Bureau. In this regard, petitioner should look to himself as to why he has been unable to obtain the business, or seek new ways to obtain business.

The petitioner should know that it has the right to supply commercial services similar to or identical with government services in general (subject to any formal government orders creating monopolies which may be perfectly legal, such as exclusive franchises, etc.), but that does not mean or imply that the government must then stop providing these services.

Petitioner apparently believes that police "protection" only involves the prevention of theft. Respondents suggest that the word "protection" can easily encompass the process of safeguarding the lives and property of citizens.

Unlike a car towing operator of disabled automobiles where the disabled automobile is pulled to the side of the road, away from moving traffic, and where said disabled automobile is no longer in any danger, the situation involving a disabled vessel which requires towing service, cannot be pulled to the side of any road nor can it be placed in *any* position of safety on the water. The only

manner of treating such disabled vessel, as was explained in the affidavit of Captain Martin Jellema, which disabled vessel is at the mercy of the elements, is to tow to the nearest point of safety. Petitioner, or anyone else, can then be engaged by the owner and/or operator of the disabled vessel, after said vessel has reached a point of safety, to take said disabled vessel from that point of safety to such place as may be determined for the purpose of performing whatever services are necessary in order to repair the said disabled vessel.

The functions performed by the Nassau County Marine Bureau police are for a public purpose, and although the occupants and/or owners of the disabled vessels may benefit from being towed to the nearest point of safety, this does not change such functions from being a public purpose which is to protect citizens and visitors to the County of Nassau. This clearly is not in violation of Article 8, §1 of the New York State Constitution, which prohibits *gifts* or *loan of property* to private persons.

The New York State Constitution only prohibits as a gift the giving of money, credit or property and not *services*, as suggested by petitioner. All of the examples cited by the petitioner represent gifts of money, credit or property only. Contrary to petitioner's contentions, it is a common law police power of municipalities to provide services designed to protect and safeguard life and property. Although a specific statutory authorization is not needed, one exists anyway and can be found in the provisions of the federal and state law as well as the Nassau County Administrative Code, as stated *supra*.

The conduct of respondents in removing or towing disabled or stranded boats from their navigable and tidal waters is not only sanctioned by state law, it is mandated

by federal law. Thus, petitioner's argument is totally specious and unfounded. The Navigation Law, §2(4), the County Government Law of Nassau County, Article 8, the Nassau County Administrative Code, Chapter VIII, the former Nassau County Police Act and State Law 7-a are all New York State statutes which authorize and presently sanction the Nassau County Police Department Marine Bureau's procedure of assisting and towing distressed vessels on its navigable and tidal waterways. Of singular importance are the provisions of federal law on the subject, to wit, 14 U. S. C. §§ 2, 81, 88 and 826. 14 U. S. C. §88(a)(4) authorizes the United States Coast Guard to tow floating dangers to navigation. 14 U. S. C. §826 authorizes the United States Coast Guard to utilize for any purpose incident to carrying out its functions and duties, any vessel placed at its disposal by any political subdivision of a state. Thus, when the United States Coast Guard contacts the Nassau County Marine Bureau and said Bureau acts in response to the United States Coast Guard, respondents herein are in full compliance with state and federal law on this subject. While respondents contend that the General Business Law §340 has no application herein, it is apparent that assuming *arguendo* it does, compliance by respondents with 14 U. S. C. §826, as required by the Supremacy Clause of the United States Constitution, would bar the applicability of General Business Law §340.

Since General Business Law §340 is patterned after the federal Sherman Anti-Trust Act, it is proper to analogize a municipality's liability under the latter to its liability under the New York State statute. Under the Sherman Anti-Trust Act, a municipality will enjoy immunity from anti-trust scrutiny if its action constitutes either the action of the state itself in its sovereign capacity or municipal action in furtherance or implementation of a clearly articulated

and affirmatively expressed state policy. *Parker v. Brown*, 317 U. S. 341, 350-351, 63 S. Ct. 307, 87 L. Ed. 315, 325-327 (1943); *City of Lafayette v. Louisiana Power and Light Co.*, 435 U. S. 389, 410, 98 S. Ct. 1123, 55 L. Ed. 2d 364, 381 (1978); *Community Communications Company, Inc. v. City of Boulder, Colorado*, ____U. S. ____, 70 L. Ed. 2d 810, 102 S. Ct. ____ (1982). Pursuant to the state laws previously adverted to herein, it is clear that the actions of the respondents would be exempt from federal anti-trust liability since such conduct is an implementation of the clearly articulated and affirmatively expressed state policy contained in the state statutes herein, as well as a lawful exercise of the police power of the state. Therefore, as noted earlier, since Section 340 of the General Business Law is patterned after the Sherman Anti-Trust Act, respondents' conduct should likewise be exempt from anti-trust liability under the state statute. *Optivision, Inc. v. Syracuse Shopping Center Assocs.*, 472 F. Supp. 665, 680, 681 (N.D.N.Y. 1979).

Section 340 of the General Business Law clearly requires some kind of "contract, agreement, arrangement, or combination" between two or more entities. See *State of New York v. Mobil Oil Corp.*, 38 N. Y. 2d 460, 464 (1976). In the case at bar, the actions taken by respondents are in full compliance with federal and state laws. Furthermore, the aforesaid section requires a monopoly or restraint of competition "in the conduct of any business, trade or commerce or in the furnishing of any service." The actions of respondents herein certainly cannot be characterized as a monopoly of a business, trade or commerce since the United States Coast Guard can designate any member of the Coast Guard Auxiliary, any corporation, partnership, association, state or political subdivision to assist it in its functions and duties. Moreover, the "furnishing of any

service" language applies only to anti-competitive practices of service industries, thereby being "confined to a commercial or business setting." *In re Freeman*, 34 N. Y. 2d 1, 7 (1974). Respondents' conduct, as noted above, cannot possibly be characterized as monopolistic in nature.

Even if the activities of respondents are considered to be within the scope of Section 340(1) of the General Business Law, such activities are warranted nevertheless as a reasonable and proper exercise of its police power to protect and foster public health, safety and welfare. The governmental service provided by the respondents is clearly essential to the safety, health and welfare of mariners and their property, who frequent the navigable and tidal waterways of the County of Nassau.

Finally, petitioner's contention that the respondents' conduct constituted a taking without compensation is completely without merit. Petitioner in its petition cites *Rochester Telephone Corp. v. Village of Fairport*, 84 A. D. 2d 455 (4th Dept. 1982), as support for its argument. This case, however, is readily distinguishable from the one at bar. The facts of that case involve the utility's action against the Village of Fairport for costs incurred in placing certain transmission facilities underground in an area being reconstructed by the village. The Fourth Department of the State of New York, in imposing liability on the village, reasoned that the reconstruction was neither reasonable nor necessary for the public good. Respondents submit that their conduct is a necessary and appropriate exercise of the police power that is mandated by both state and federal law. The Court of Appeals of the State of New York has indicated that where government acts in its arbitral capacity, there is no compensable

damage. *Lutheran Church v. City of New York*, 35 N. Y. 2d 121 (1974).

The case of *Barry v. Barchi*, 443 U. S. 55 (1979), cited by the petitioner at page 34 of its brief, deals with a suspension of a horse trainer's license under New York Law. In *Barry v. Barchi*, only the post-suspension procedure was held violative of due process in that there was no provision for a timely hearing. Obviously, that case cannot be analogized to the within case, in that, here, the respondents never gave the petitioner a license, much less suspended one. The license referred to by petitioner in its brief is from the Coast Guard, and has nothing whatever to do with the respondents. The respondents did not grant petitioner a license, nor can they take one away. Petitioner would have this Court believe that the Marine Bureau is directing their time and energies solely to discredit one individual. The claims of defamation are baseless. Furthermore, the "proof" of this defamation comes from petitioner itself in hearsay statements which are vague as to time and place and totally devoid of names.

The cases set forth in the petition all deal with the taking (by the giver) of a vested right, such as in a license. See also this Honorable Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, ____U. S. ____, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982), in which it was held that a New York law requiring landlords to allow cable television on the property was held to be a "taking" of property compensable under the Fifth and Fourteenth Amendments.

There must be a right, life, liberty or property which is taken without just compensation. In the within case, petitioner claims there has been a taking. Where is the taking? As stated above, the Marine Bureau had been in existence

long before the petitioner ever thought about being in the towing business. Petitioner's complaints can be analogized to an individual going into the private detective business and complaining that he loses business because the Police Department has a detective squad! Certain functions of our society are governmental and must be treated as such. Furthermore, the Tenth Amendment to the United States Constitution exempts certain integral government operations including, as in the within case, a clear exercise of police power from anti-trust scrutiny.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD G. McCABE
County Attorney of Nassau County
Attorney for Respondents
Nassau County Executive Building
1 West Street
Mineola, N. Y. 11501
(516) 535-3005

KATHRYN DRISCOLL HOPKINS
Deputy County Attorney
Of Counsel

MICHAEL J. MARRIN
Law Intern
On the Brief

Order of the New York State Court of Appeals, Dated November 16, 1982, with Notice of Entry.

STATE OF NEW YORK,

COURT OF APPEALS.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of November A.D. 1982.

PRESENT, Hon Lawrence H. Cooke, *Chief Judge, presiding.*

2 Mo. No. 1177 SSD 134

AQUATIC TECHNICAL SERVICES, Inc.,
Appellant,

vs.

COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT, *et al.*,
Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that no substantial constitutional question is directly involved.

JOSEPH W. BELLACOSA
Clerk of the Court

Notice of Entry.

Sir:

Please take notice that the within is a copy of an Order duly made and entered in the office of the Clerk of the Court of Appeals on the 16th day of November, 1982.

Yours, etc.

EDWARD G. McCABE
County Attorney of Nassau County
Attorney for Defendants-Respondents
Office and Post Office Address
Nassau County Executive Building
Mineola, New York, 11501

To:

Tedone and Tedone, Esqs.
Appellate Attorney for Plaintiff Appellant
2001 Marcus Avenue
Lake Success, New York 11042

Banno, Landi & Pajion, Esqs.
Attys. for Plaintiff
146 Old Country Road
Mineola, New York 11501

State of New York,
County of Nassau, ss:

Affidavit of Service by Mail.

Sophie Goldrich, being duly sworn, deposes and says that deponent is over eighteen years of age, not a party to the proceedings herein. That deponent is employed in the

office of the County Attorney of Nassau County; that on the 19th day of November, 1982 deponent served within order with notice of entry upon

Tedore and Tedore, Esqs.
Appellate Counsel for Plaintiff-Appellant
2001 Marcus Avenue
Lake Success, New York 11042

Banno, Landi & Pajion, Esqs.
Attorneys for Plaintiff
146 Old Country Road
Mineola, New York 11501

by depositing a true copy of the same securely enclosed in a post-paid wrapper in a post office box regularly maintained by the United States Government at Nassau County Executive Building, Mineola, New York, directed to the above at the addresses within the state designated by them for that purpose upon preceding papers.

SOPHIE GOLDRICH

Sworn to before me this
19th day of November, 1982
Theresa Fiero
Notary Public

Theresa Fiero
Notary Public,
State of New York
No. 30-6287650
Qualified in Nassau County
Commission Expires March 30, 1984

be the duty of the heads of each department, institution, office or agency to submit to the deputy commissioner of general services, division of purchase and supply on forms to be supplied by him a requisition for all supplies, materials and equipment the purchase of which has been authorized by the budget for such fiscal year and the necessity for the purchase of which can be clearly foreseen, together with the dates on which such supplies, materials or equipment will be required.

(Amended by Local Law No. 1, 1945; Local Law No. 1, 1958; Local Law No. 19, 1965; Local Law No. 9, 1971, in effect September 27, 1971; Local Law No. 4, 1980, in effect June 9, 1980.)

§ 705. **Deputy Commissioner of general services**, division of purchase and supply may act for town, cities, villages and districts. The deputy commissioner of general services, division of purchase and supply, upon the request of any town, city, village, school district or special district in the county, may act as purchasing agent for such town, city, village, school district or special district, either for all or any part of its purchase, upon such conditions as may be prescribed by ordinance.

(Amended by Local Law No. 1, 1958; Local Law No. 19, 1965, Local Law No. 9, 1971, in effect September 27, 1971; Local Law No. 3, 1980, in effect June 9, 1980.)

ARTICLE VIII

Department of Police

Section 801. Department established.
802. Powers and duties.
803. Entrance into and withdrawal from county police district.
804. Contracts with county police department.

§ 801. **Department established.** There shall be a department of police, the head of which shall be the commissioner of police.

§ 802. **Powers and duties.** Except as otherwise provided in this act, the county police district, if there be one, and the organization, powers, and duties of the police department shall continue to be as provided by the laws of this state relating to police, applicable to the county and in

force on the date when this act becomes effective in the county, and the commissioner of police shall be and have the powers and duties of chief of police as therein provided. All portions of any town, unincorporated as a village or a city at the date on which this act becomes effective in the county or not included in a town police district on such date. irrespective of the inclusion thereof in a village or city incorporated or erected after such date, shall continue to be a part of the county police district, provided however, this shall not apply to any territory which may hereafter be annexed to a city or village existing at the date on which this act becomes effective.

(Amended by L. 1950 Ch. 450, in effect April 5, 1950.)

§ 803. **Entrance into and withdrawal from county police district.** Any city may by ordinance, and any village or police district not a part of the county police district at the date on which this act becomes effective in the county may by resolution of its board of trustees or other governing body, request that the territory of such city, village or police district become a part of the county police district on the first day of January next succeeding the effective date of such ordinance or resolution and that its police force be made part of the county police force. Thereupon, the board of supervisors, if it shall approve the request, may, by resolution, constitute the territory of such city, village or town police district a precinct or a part of the precinct of the county, and constitute the police force of such city, village or town police district members of the police force of the county. In the instance of any city, or of a village or town police district to which the rules of the state civil service commission have been extended, the police force of such city, village, or town police district shall become members of the police force of the county with such rank as shall be certified to the board of supervisors by the civil service commission having jurisdiction thereof. In the case of all other villages or town police districts, the police force of such village or town police district shall become members of the police force of the county with such rank as may be agreed upon by the board of supervisors and the governing body of such village or town police district. Any such city or village may withdraw from the county police dis-

trict on the thirty-first day of December of any year, provided that such ordinance or resolution shall not go into effect for thirty days after its adoption, and if in the meantime a petition of qualified electors equal to ten per centum of the total vote cast in such city or village at the last preceding city or village election shall be filed with the city or village clerk, as the case may be, such ordinance or resolution shall be referred to the people at the next ensuing city or village election, and shall not take effect unless a majority of those voting on the proposition vote in the affirmative; provided that such former police of such city or village as at that time are members of the county police department shall by the act of such withdrawal be returned to their former status as members of such city or village police. (Amended by L. 1937 Ch. 618 § 22, in effect January 1, 1938.)

§ 804. **Contracts with county police department.** Any city, village, or police district, not a part of the county police district, may by ordinance, in the case of a city, or by resolution of the governing body, in the case of a village or police district, enter into a contract with the county police department for a term of not less than two years, by which the county police department will agree to provide a specified degree and type of police protection at a price to be set forth in such contract. It shall be competent in such contract to provide for the number of police to be assigned to duty in such city, village, or district, and the number, ranks and rates of pay of city, village, or district police to be taken into the county police force; provided that, on the termination of such contract, such former police of such city, village or district as at that time are members of the county police department, shall by the act of terminating such contract be returned to their former status as members of the city, village, or district police. Nothing therein contained shall be taken to limit the power of the commissioner of police in removing, demoting, or otherwise disciplining any member of the county police force.

b. Nothing herein contained shall be construed to constitute such school crossing guards and police cadets, members of the police force or to entitle them to the privileges and benefits of the members of the police force nor shall they be deemed peace officers.

c. The commissioner of police shall have the authority to promulgate rules and regulations governing the conduct of school crossing guards and police cadets and he shall prescribe the insigna and uniform to be worn by such guards and cadets.

d. The salaries and other costs and expenses of the police department in connection with guarding school crossings shall be a charge upon the police districts.

(Added by Local Law No. 5, 1954, in effect November 1, 1954; former 8-2.0 renumbered § 8-2.1 and amended by Local Law No. 9, 1965, in effect June 4, 1965.)

e. School crossing guards shall be empowered to issue appearance tickets for parking offenses.

(Subd. e., added by Local Law No. 1, 1982, in effect January 18, 1982.)

§ 8-3.0 **Commissioner; powers and duties.** Except as otherwise provided in this chapter, the commissioner shall have the jurisdiction and control of the government, administration, disposition and discipline of the police department and he may promulgate and enforce rules and regulations for such purposes. (§ 8.3.0 erroneously omitted in compiling main volume; amended by Local Law No. 3, 1945, in effect July 9, 1945.)

§ 8-4.0 **Police Force.** There shall be a police force which shall render such police service as may be prescribed by this chapter. The police force shall consist of such numbers of captains, lieutenants, sergeants, and police officers as shall be determined by the board of supervisors upon the

(Continued on Page 104-1)

Section 8-12.0 and 8-13.0 of the Nassau County Administrative Code.

2. Is not a citizen of the United States;

3. Cannot understandingly read and write the English language; or

4. Shall not have resided in the county for one year next preceding his appointment.

(Paragraph 4 of subd. a, amended by Local Law No. 5-1952, in effect November 3, 1952.)

b. Subdivision (a) shall not apply to the commissioner.

§8-12.0 **Detail to duty.** The commissioner may detail without regard to residence, members of the police force to such parts of the county, and to such criminal courts therein as he may deem advisable. He shall also detail to the civil courts held within the county on request of a judge or justice thereof, such number of members of the police force as may be necessary.

§8-13.0 **Discipline and punishment.** a. The commissioner shall have power to discipline a member of the force by:

1. Reprimand;

2. Fine;

3. Suspension, with or without pay;

4. Dismissal or removal from the force; or

5. Reducing him to any grade below that in which he was serving, if he be above the grade of patrolman, after which his compensation shall be the same as that allowed to members of the grade to which he is reduced.

b. Such members shall be disciplined for the following reasons only:

1. Conviction for any criminal offense;

2. Neglect of duty;

3. Violation of rules;

4. Neglect or disobedience of order;

5. Incapacity;

6. Absence without leave;

7. Conduct injurious to the public peace or welfare;

8. Immoral conduct;

9. Conduct unbecoming an officer; or

10. Any other breach of discipline.

The commissioner may designate a captain to conduct hearings on charges against lieutenants, sergeants and patrolmen and to report his fingings and recommendations to the commissioner for action thereon. In case of disciplinary action by fine, not more than thirty days' pay shall be forfeited and withheld for any offense.

c. The commissioner shall remove or dismiss any member of the force only after:

1. Written charges are preferred against and served upon such member, and

2. Such member shall have had an opportunity to be publicly heard and examined before the commissioner.

d. A petition to review a determination by the commissioner to fine, suspend, dismiss or otherwise discipline a member of the police force shall not be granted after the expiration of thirty days from the service of a notice of such determination upon the member of the force so fined, suspended, dismissed or otherwise disciplined.

(Amended by L. 1948 Ch. 436, in effect March 23, 1948.)

Section 8-15.0 of the Nassau County Administrative Code.

§8-14.0 **Resignation; unexplained absence.** a. Any member of the force who shall withdraw or resign, without the permission of the commissioner, shall forfeit such salary or pay which shall be due him. The commissioner may deem an unexplained absence, without leave, on the part of any member of the force for five days or more, a resignation by such member and accept it as such.

b. Any member of the police force who shall accept any place of public trust or civil emolument, or shall be publicly nominated for an elective office, and shall not within ten days thereafter publicly decline such nomination, shall be deemed thereby to have vacated his office.

§8-15.0 **Expenses of the police department; how raised.** a. The board of supervisors shall annually cause to be raised the amount of money required to pay the annual expenses of the police department by levying and collecting a uniform tax upon the real estate subject to taxation located within the police district.

b. Notwithstanding the provisions of subdivision a of this section, the board of supervisors shall annually cause to be raised by levying and collecting a tax upon the real estate subject to taxation located within the county, the amount of money required to pay the annual expenses of the maintenance, operation and personal services of the bureaus, divisions or offices which serve the county, including the following:

1. Communications bureau.
2. Detective bureau.
3. Information bureau.
4. Public saftey bureau.
5. Administrative division.
6. Air division.
7. Identification division.
8. Marine division.
9. Radio division.
10. Transportation and maintenance division.
11. Office of commissioner of police.
12. Offices of chief and district inspectors.
13. Office of police surgeon.

14. Office of property clerk.
15. Technical research laboratory.
16. Highway patrol.
17. Emergency ambulance patrol.
18. Such other bureaus, divisions, squads or offices which serve the county.

Such expenses shall be a county charge.

(Amended by Local Law No. 2 - 1951, in effect December 24, 1951.)

§ 8-16.0 **Petty cash fund.** The board of Supervisors may authorize the county treasurer to furnish the department of police with a petty cash fund, in such amount as the board of supervisors may specify by resolution. Expenditures from this fund shall be covered by itemized vouchers or claims in the name of the fund verified by the oath of the commissioner of police. Upon audit of such vouchers or claims and by means of a warrant drawn on the county treasurer, signed by the comptroller, the treasurer shall reimburse such petty cash fund the amount so audited and allowed.

Such fund shall be used for:

1. Defraying the expenses of the department in meeting public emergencies, and

2. Advancing the expenses that might be incurred by members of the force in the course of their assigned duties.

(Former §8-16.0 repealed; new §8-16.0 added by Local Law No. 1, 1946; amended by Local Law No. 6, 1954, Local Law No. 7, 1963, Local Law No. 13, 1966; Local Law No. 3, 1966 in effect September 23, 1966.)

§8-17.0 **Liability of county for negligent operation of vehicles.** a. The county shall be liable for the negligence of a member of the police department while operating a vehicle owned by the county upon the public streets or highways of the county in the discharge of a statutory duty imposed upon the police department, providing such member at the time of the accident or injury was acting in the discharge of his duties and within the scope of his employment.

b. Any liability incurred by the county pursuant to this section shall be a charge against the county and moneys to

Section 8-22.0(5) of the Nassau County Administrative Code.

b. Any warrant of search or arrest issued by any magistrate of this state may be executed in any part thereof by any member of such force. The provisions of the code of criminal procedure relating to the giving and taking of bail shall apply to any arrest so made by a member of such force.

§8-22.0 **Duties of police department.** It shall be the duty of the police department within the boundaries of the police district to:

1. Preserve the public peace.
2. Prevent crime.
3. Detect and arrest offenders.
4. Protect the rights of persons and property.
5. Guard the public health.
6. Preserve order at elections and all public meetings and assemblages.
7. Remove nuisances existing in public streets, roads, places and highways and arrest all street mendicants and beggars.
8. Regulate the movement of vehicular traffic in streets, road, places and highways and install or authorize the installation of traffic signal lights for said purposes.

(Subd. 8 amended by Local Law No. 5, 1964, in effect August 19, 1964.)

9. Provide proper police attendance at fires.

(Subdivisions 10 and 11 repealed by Local Law No. 3 - 1945, in effect July 9, 1945.)

10. Enforce and prevent the violation of all laws and ordinances in force in such district; and for these purposes with or without warrant, to arrest all persons guilty of violating any law or ordinance for the suppression or punishment of crime and offenses.

(Subdivision 12 renumbered to be subdivision 10 by Local Law No. 3 - 1945, in effect July 9, 1945.)

§8-23.0 **Departmental records and books.** The commissioner shall cause to be kept a general complaint book, police blotters, a force record and such other records and books as he may, with the approval of the county executive,

Section 22-1.0 of the Nassau County Administrative Code.

12. to plan and implement programs to increase the general understanding of the contribution of the arts to the economic development of the county and tourism.

13. to perform such other duties that the county executive and the board of supervisors may assign.

14. notwithstanding any of the above provisions, the board shall not have any authority over programs conducted by the Nassau county department of recreation and parks or of the friends of the Nassau county museum.

§ 21-100.4 **Compensation and expenses.** All members shall serve without salary or compensation with the exception of the chairman who, as director, shall receive a salary as ordinanced annually. However, all members shall be allowed their actual and necessary expenses incurred in the performance of their duties.

(Referred to as "Title II" in original; probably should be "Title J"; added by Local Law No. 5, 1978, in effect September 25, 1978.)

CHAPTER XXII

GENERAL PROVISIONS

Title A. In General

Section 22-1.0 Definitions.
22-2.0 Powers of heads of agencies over subordinates.
22-2.1 Personal liability of heads of agencies.
22-2.3 Attendance of officers and employees at conference, conventions and schools.
22-2.4 Fiduciary bonds.
22-2.5 Individual official undertakings.
22-2.6 Notary public commissions.
22-2.7 Group automobile insurance payroll deduction.
22-2.8 Indemnification.
22-3.0 Rules and regulations.
22-3.1 Destruction of books, accounts and papers.

22-4.0 Official oaths.
22-4.1 County agencies relieved from payment of fees to county and town officers.
22-4.2 Code of Ethics.
22-5.0 Construction.
22-6.0 Enumeration of powers not restrictive.
22-7.0 Method of numbering used herein.
22-8.0 No revival of laws.
22-9.0 No repeal by implication.
22-10.0 Effect of local law.
22-11.0 Judicial notice.
22-12.0 Effect of this code on existing law.
22-13.0 Separability.
22-14.0 Short title.
22-15.0 Nassau Community College Security Force
22-15.1 D.G.S. - Appearance Tickets -

TITLE A
In General

§ 22-1.0 **Definitions.** As used in this code, unless otherwise expressly stated or unless the context or subject matter otherwise requires:

1. The term "charter" means the county government law of the county of Nassau.

2. The term "county" means the county of Nassau.

3. The term "board of supervisors" means the board of supervisors of the county of Nassau.

4. The term "administrative code" or "code" means the Nassau county administrative code.

5. The term "municipal corporation" means any town, village or city in the county of Nassau.

6. The term "district" means any special or school district in the county of Nassau.

7. The term "superintendent of public works" means the state superintendent of public works.

Section 22-3.0 of the Nassau County Administrative Code.

9. Except as otherwise specifically provided in this section, the provisions of this section shall not be construed in any way to impair, alter, limit, modify, abrogate or restrict any immunity available to or conferred upon any unit, entity, officer or employee of the county or any other level of government, or any right to defense and/or indemnification provided for any governmental officer or employee by, in accordance with, or by reason of, any other provisions of state, county or federal statutory or common law.

10. If any provisions of this section or the application thereof to any person or circumstance be held unconstitutional or invalid in whole or in part by any court of competent jurisdiction, such holding of unconstitutionality or invalidity shall in no way affect or impair any other provision of this section or the application of any such provision to any other person or circumstance.

(Amended by Local Law #2-1980, in effect April 30, 1980.)

§ 22-3.0 **Rules and regulations.** Each head of an agency, except as otherwise provided by law, may make rules and regulations for the conduct of his office or department.

§ 22-3.1 **Destruction of books, accounts and papers.** The head of any agency shall have the right and power to destroy such books, accounts, letters, maps, charts, papers or other writings which have been retained in his office over six years, upon consent of the commissioner of education of the state of New York and when specifically authorized so to do by ordinance of the board of supervisors.

(Amended by L. 1949 Ch. 247, in effect March 22, 1949.)

§ 22-4.0 **Official oaths.** Every officer of the county shall take and file an oath of office before he shall be entitled to enter upon the discharge of his official duties.

§ 22-4.1 **County agencies relieved from payment of fees to county and town officers.** a. It shall be unlawful for any salaried officer of the county or of the towns within the county or of the supreme court held in and for Nassau county or of the surrogate's court of Nassau county or of the county court of Nassau county or of the district court

Section 22-10.0 of the Nassau County Administrative Code.

Law No. 4, 1964, adding subsection c to subdivision 1, in effect August 19, 1964, subdivision 7 amended by Local Law No. 9, 1973, in effect October 1, 1973; adding section 8 by Local Law No. 2, 1976, in effect February 3, 1976; subd. (b) of section 8 added by Local Law No. 4-1977, in effect April 18, 1977)

§ 22-5.0 **Construction.** This code shall be construed liberally.

§ 22-6.0 **Enumeration of powers not restrictive.** The enumeration of specific powers by this code shall not operate to restrict or limit a general grant of power contained in this code or to exclude other powers comprehended in such general grant.

§ 22-7.0 **Method of numbering used herein.** The method of numbering sections of the code by reference to related articles of the charter shall not be construed to limit the application of such sections to the articles of the charter to which such sections refer.

§ 22-8.0 **No revival of laws.** a. If in this code there shall have been incorporated any provision of law that heretofore shall have been superseded or specifically or impliedly repealed, such incorporation shall not revive such superseded or repealed provision nor shall such incorporation be construed to indicate any legislative determination that such provision had not been theretofore so superseded or repealed.

b. Subdivision a shall not apply to section 19-18.0 of the code.

§ 22-9.0 **No repeal by implication.** It is not intended by this code to repeal by implication any existing provision of law and no law shall be deemed repealed thereby unless expressly provided for herein.

§ 22-10.0 **Effect of local law.** This code shall not operate to deprive the board of supervisors of the power to enact local laws in relation to any matter in respect to which such power would otherwise exist, nor shall it limit such power. If this power otherwise exists, any provision of

this code may be superseded, supplemented or amended by local law in the same manner and to the same extent as such provisions could be superseded, supplemented or amended had this code not been enacted.

§ 22-11.0 **Judicial notice.** All courts shall take judicial notice of all laws contained in this code and of all rules and regulations adopted pursuant to the charter or the code.

§ 22-12.0 **Effect of this code on existing law.** Insofar as the provisions of this code are the same in terms or in substance and effect as provisions of law in force when this code shall take effect relating to or affecting the county, the provisions of this code are intended to be not a new enactment but a continuation of such provisions of law, and this code shall be so construed and applied.

§ 22-13.0 **Separability.** If any clause, sentence, paragraph, section or part of this code shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 22-14.0 **Short title.** This code shall be known and may be cited as the "Nassau county administrative code."

§ 22-15.0. The Nassau Community College Security Force is hereby authorized to issue appearance tickets for parking offenses on the Nassau Community College Campus.

Added by Local Law 1 - 1980 in effect February 4, 1980.)

§ 22-15.1. The security personnel of the Department of General Services with titles of Security Officer II, III or IV are hereby authorized to issue appearance tickets for parking offenses which occur in County installations.

Added by Local Law Local Law #3-1980 in effect June 9, 1980.)

Section 26-14.0 of the Nassau County Administrative Code.

c. Such board of supervisors is hereby further authorized, from time to time, to appropriate and otherwise make available as in the case of county expenses, sums sufficient to pay such salaries or compensation and such other expenses as may be necessarily incurred by such board, which expenses such board is hereby authorized to incur. Such moneys shall be paid out in the same manner as county expenses on the requisition of a person designated for such purpose by the board.

§ 26-13.0 **Duration of board.** Nothing contained in any law shall be construed to prevent the county executive, the county attorney, the comptroller, and the members of the board of supervisors from serving on such board. The board of statutory consolidation and revision shall expire two years after the seventh day of February, nineteen hundred thirth-nine.

§ 26-14.0 **"Municipal corporations" defined.** As used in this article, the term "municipal corporations" shall mean or include the towns, villages, cities, and districts contained in the county.

Section 2. **Laws repealed.** a. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column, is hereby repealed.

b. The term "part relating to Nassau county" when used in the schedule of laws repealed hereto annexed, shall mean and include such part of the provision of law which relates to any agency or area of the county or any municipal corporation or department therein, or any part thereof.

Section 3. **Time of taking effect.** This act shall take effect immediately.

Office-Supreme Court, U.S.
FILED
MAR 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1364

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

AQUATIC TECHNICAL SERVICES, INC.,
Petitioner,

v.

COUNTY OF NASSAU, NASSAU
COUNTY POLICE DEPARTMENT,
SAMUEL ROZZI, Commissioner
of Police, and FRANCIS T.
PURCELL, County Executive,
Respondents.

WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF NEW YORK

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Carl C. Banno
Banno, Landis & Pajion
146 Old Country Road
Mineola, New York 11501
516/746-5100

Counsel of Record
for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. Does this Court have jurisdiction to consider the questions raised in the Petition for Writ of Certiorari?

II. Are towing operations conducted by marine police officers in non-emergency situations performed in excess of valid police powers?

III. Do these towing operations infringe upon a private salvor's constitutionally protected liberty and property interests?

IV. Does marine police officer's unwarranted questioning of a private salvor in front of potential customers infringe the salvor's constitutionally protected liberty and property interests in his good name and reputation when these actions result in loss of business to the salvor?

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STATUTORY PROVISIONS INVOLVED

N.Y. Civ. Prac. Law § 5601 (McKinney 1978) provides in pertinent part:

> (b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:
>
> 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and
>
> 2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

N.Y. Civ. Prac. Law § 5602 (McKinney 1978) provides:

> Appeals to the court of appeals by permission
>
> (a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:
>
> 1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,
>
> (i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or
>
> (ii) from a final judgment of such court or final determination of such agency where

the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601; and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not

finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final

judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO CONSIDER THE QUESTIONS RAISED IN THE PETITION FOR WRIT OF CERTIORARI.

In their Brief in Opposition the Respondents raise the question of whether this Court has jurisdiction under 28 U.S.C. § 1257(3) to consider the questions raised in the Petition for Writ of Certiorari. Their argument, essentially, is that the November 16, 1982, order of the Court of Appeals of New York (reprinted in the

Petition for Writ of Certiorari at A-27 through A-28) is not a final order of the state court system from which the Petitioners (hereinafter jointly referred to as "Rickard") may seek review. Yet the very decisions relied upon by the Respondents indicate that the November 16 order is, indeed, final.

This question is something of a mix of federal and state law. Certainly the ultimate decision, that is, the question of this Court's jurisdiction, is a federal question to be determined by this Court. Yet if state law would declare the November 16 order to be a non-final decree, this Court certainly would acknowledge that law. Curiously, the Respondents cite no state law authority for their argument other than the two civil practice laws, N.Y. Civ. Prac. Law §§ 5601 and 5602. These laws establish two methods by which an appeal

from the Appellate Division of the Supreme Court of the State of New York to the Court of Appeals of the State of New York may be had. First, under certain circumstances, such as where a question is raised under the United States Constitution, an appeal is permitted by right. N.Y. Civ. Prac. Law § 5601(b)(1). Second, under all other circumstances, the appellant must first receive permission to appeal. The Respondents appear to argue that where an appeal by right is denied, the order of the court of appeals denying this appeal is not final for the purpose of 28 U.S.C. § 1257(3) until the court of appeals further denies an appeal by permission. Neither the plain language of N.Y. Civ. Prac. Law §§ 5601 and 5602 nor case law from New York supports this conclusion.

Indeed, decisions from this Court do not support this conclusion. The two cases

arising from New York, decided by this Court, and relied upon by the Respondents support just the opposite conclusion. (See Brief in Opposition at 8)

In McMaster v. Gould, 276 U.S. 284 (1928), the original plaintiffs had appealed an interlocutory trial court order to the appellate division, which affirmed the order. Permission to appeal to the court of appeals was denied by the appellate division. The plaintiffs then appealed without permission to the court of appeals, which dismissed the appeal. This Court held that the plaintiffs' refusal to seek permission from the court of appeals after the appellate division denied the same meant that the appellate division's affirmance of the trial court decree was not a decree of the highest state court. Id. at 286-87. This Court recognized, however, that the state court appeal in McMaster

was a discretionary appeal, not an appeal by right. Id. at 286. In the present case, the final order of the court of appeals means that all federal constitutional questions before the state courts have been resolved and that a petition for review to this Court is ripe.

Essentially the same considerations came into play in Gotthilf v. Sills, 375 U.S. 79 (1963). There, the court of appeals dismissed its permission to appeal because the order appealed from did not finally determine the action, unlike the order from the appellate division in the present case. This Court noted that, because the order appealed from was not a final order, state law required permission of the appellate division for appeal to the court of appeals, and this was never applied for in Gotthilf. Id. at 80. In the present case, because a federal constitutional

question was raised, no permission was needed from the appellate division. N.Y. Civ. Prac. Law § 5601(b)(1).

Equally specious are the other decisions relied upon by the Respondents. Rickard here perfectly meets the test established by this Court in Minneapolis, St. Paul & Saulte Ste. Marie Railway v. Rock, 279 U.S. 410, 412 (1929), which is that this Court has jurisdiction to review federal questions when the highest state court affirms or denies the validity of the judgment of the lower state court. Accord Chesapeake & Ohio Railway v. Mihas, 280 U.S. 102, 103-04 (1929). In fact, the alternatives proposed by this Court in Matthews v. Huwe, 269 U.S. 262 (1925), perfectly describe the quandry Rickard would find himself in if he had followed the Respondents' suggestion and sought discretionary review from the New York Court of Appeals.

In Matthews, the state supreme court had dismissed an appeal of right because of the lack of a debatable federal question. The petitioners then sought review in this Court not from the state supreme court decree but from state intermediate court (the court of appeals) decree. This Court stated:

> The plaintiffs in error are thus in a dilemma from which they cannot escape. If the Supreme Court by final decree disposed of the constitutional questions on the merits by dismissal of the petition, then the writ of error lay to the Superme Court. If it did not, then the decree of the Court of Appeals did not become that of the highest court to which a writ of error would lie from this court for lack of application for certiorari.

Id. at 266. Obviously, in the present case the court of last resort, the New

York Court of Appeals, "disposed of the constitutional questions on the merits by dismissal of the petition." Id. Thus, this Court may consider those questions.

In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477 (1975), Justice White, writing for the Court, acknowledged the general rule that review by this Court ordinarily is precluded where any issues remain for the state court to decide. In the present case, a decision by the court of appeals on state law grounds after a grant of discretionary review conceivably could moot the federal constitutional questions. But, Justice White continued, certain well-recognized exceptions have been carved out of this general rule. The first and fourth exceptions, that is, where the federal question is conclusive, id. at 479, and where federal policy might seriously be eroded, id. at 482-83, probably are not

applicable to the present case. Either the second or the third exception, though, certainly is applicable to the present case.

The second exception defined in Cox Broadcasting exists where the federal question will remain regardless of the outcome of future state court proceedings. Id. at 480. Assuming that the New York Court of Appeals would consider on discretionary review the federal issue it already has resolved on an appeal by right—an unlikely assumption—the federal question would remain such that one party or the other could seek review in this Court.

Far more important is the third Cox Broadcasting exception, that is, that this Court will review federal issues even though certain state questions may remain where later review of the federal question cannot be had no matter how the future

proceedings are resolved. Id. at 481. The court of appeals in the present case likely would have refused to reexamine the federal constitutional question it already had resolved had a discretionary appeal been sought. If that is so, the final decision of the court of appeals would have come long after the time had elapsed for review by this Court of the court of appeals' final decision. See 28 U.S.C. § 2101(c). Certainly a current review by this Court falls within the "pragmatic approach" this Court utilized in Cox Broadcasting to determine the question of finality. See 420 U.S. at 486. See also North Dakota State Board of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156, 162-63 (1973) (refusal of review would preclude further litigation on constitutional question).

This Court's "pragmatic approach" to the question of finality, 420 U.S. at 486, suggests that the November 16, 1982, order from the Court of Appeals of New York is a final order reviewable by this Court.

II. THE RESPONDENTS HAVE SUGGESTED NO REASONS WHY THE QUESTIONS RAISED IN THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE REVIEWED BY THIS COURT.

The Respondents appear to be arguing state law issues not presented to this Court. They never directly address the constitutional issues Rickard has raised. Furthermore, they misstate Rickard's position in several essential respects.

Rickard does not argue that government may not engage in private enterprise, but rather that government must find some authority other than the police power if it chooses to operate in the marketplace. (Compare Petition for Writ of

Certiorari at 16-18 with Brief in Opposition at 14) Rickard also does not argue that antitrust law is involved in the question before this Court. (See Brief in Opposition at 21-23)

In the final paragraphs of their Brief in Opposition the Respondents finally confront the issues raised by Rickard. Rickard suggests, however, that decisions such as Truax v. Raich, 239 U.S. 33 (1915), and LaBauve v. Louisiana Wildlife & Fisheries Commission, 444 F. Supp. 1370 (E.D. La. 1978), are much more pertinent to the question on appeal than are the decisions discussed by the Respondents. For this reason, Rickard requests that this Court set the present matter for plenary consideration by granting the requested writ of certiorari.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, this Court should grant a writ of certiorari to the Court of Appeals of New York.

Respectfully submitted,

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